

No. 03-20-00497-CV

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IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AUSTIN TEXAS	FILED IN 3rd COURT OF APPEALS AUSTIN, TEXAS 10/19/2020 8:50:42 AM JEFFREY D. KYLE Clerk
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Ruth Hughs, in her official capacity as Texas Secretary of State,  
*Appellant*

v.

MOVE Texas Action Fund,  
*Appellee*

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**MOVE TEXAS ACTION FUND’S EMERGENCY MOTION FOR A  
TEMPORARY ORDER TO REINSTATE TEMPORARY INJUNCTION**

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MOVE Texas Action Fund (“MOVE”) files this emergency motion for a temporary order pursuant to Texas Rule of Appellate Procedure 29.3 to reinstate, during the pendency of this appeal, a temporary injunction against Ruth Hughs, in her official capacity as Texas Secretary of State (“SOS”), and Dana DeBeauvoir, in her official capacity as Travis County Clerk (“Clerk”). The injunction involves a provision of the Texas Election Code, and it implicates the proper procedures for the upcoming Nov. 3, 2020, election. MOVE has therefore also filed a separate motion to expedite consideration of this motion for Rule 29.3 relief. Tex. R. App. P. 10.3(a).

The SOS opposes the relief sought through this motion, while the Clerk does not oppose the relief.

## OVERVIEW OF THE RELIEF SOUGHT

On October 16, 2020, a Travis County district court enjoined the SOS and the Clerk from enforcing a provision in § 102.002 of the Texas Election Code requiring a separate doctor's certification for an eligible voter to secure an absentee ballot if they receive a COVID-19 diagnosis after the regular deadline to request an absentee ballot (the "Injunction"). App.1. Shortly after the Injunction was rendered, the SOS filed a notice of interlocutory appeal to this Court. Because the SOS is the head of a state agency, the Injunction was automatically superseded and cannot be counter-superseded. *Tex. Gen. Land Office v. City of Houston*, No. 03-20-00376, 2020 WL 4726695, at \*2 (Tex. App.—Austin Jul. 31, 2020, order) ("Upon the filing of the State appellants' notice of appeal, because the State appellants are a state agency and the head of a state agency, the temporary injunction was superseded by operation of law and is not subject to being counter-superseded.") (citing Tex. R. App. P. 24.2(a)(3)).

While the automatic stay cannot be counter-superseded, this Court can issue a temporary order to preserve the parties' rights during the pendency of this interlocutory appeal. Tex. R. App. P. 29.3. Indeed, this Court recently granted Rule 29.3 relief for precisely this reason and reinstated a temporary injunction against a state agency issued by a Travis County district court. *See Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 1966314, at \*6 (Tex.

App.—Austin Apr. 24, 2020, no pet.) (“[W]e grant the District’s motion for temporary orders under Rule 29.3. We order that the trial court’s temporary injunction remains in effect to preserve the parties’ rights until the disposition of this appeal.”).

This Court should enter a similar order reinstating the Injunction during this interlocutory appeal because MOVE will suffer irreparable injury if the Injunction is not in place pending appeal.

### BACKGROUND

This case is about voter disenfranchisement stemming from the confluence of the COVID-19 pandemic and the requirements of Texas Election Code § 102.002. Under the Texas Election Code, a registered voter who suffers from a qualifying disability can request an absentee (vote-by-mail) ballot through an application self-certifying that they have a disability, which is one of the statutory criteria for voting absentee. *See* Tex. Elec. Code § 82.001. The voter need not do more than check a box. *See In re State*, 602 S.W.3d 549, 561 (Tex. 2020). No explanation or verification is required.

But if a voter becomes disabled after the application deadline—which is 11 days before election day, on Oct. 23 for this year’s presidential election—a different, more burdensome procedure applies. A voter who develops a disability (like a positive diagnosis of COVID-19) after that statutory deadline may request a late

absentee ballot. But instead of self-certifying that they have a qualifying disability, the voter must include a separate doctor's certification, using specific statutory language, that the voter "has a sickness or physical condition that will prevent him or her" from voting in person at a polling location on election day. Tex. Elec. Code § 102.002.

The doctor's certification requirement is significant because this year's presidential election is unfolding in the middle of an unprecedented global pandemic that has killed more than 16,132 Texans and sickened at least 787,271. As of the time this action was filed in early October, 96 new cases of COVID-19 were being diagnosed in Travis County per day. If that average holds, more than 1,000 people in Travis County alone will be diagnosed with COVID-19 between the regular application deadline (Oct. 23) and election day. The numbers are much greater statewide. There is no dispute that voters who have received a positive diagnosis of COVID-19 have a qualifying disability as that term is defined in the Texas Election Code. *See* Tex. Elec. Code § 82.002. But because of the requirement of the doctor's certification requirement in § 102.002, voters who are diagnosed COVID-19 positive *after* the deadline must satisfy a more burdensome procedure to vote than others who were diagnosed *before* the deadline.

To ameliorate the undue burden placed on voters by the § 102.002 doctor's certification requirement, MOVE—a Texas nonprofit organization that registers and

educates voters—established and is gearing up to operate an emergency telemedicine program. This program provides individual voters free and remote access to a physician to assist them in obtaining a doctor’s certification. The program also forces MOVE to divert resources, such as dedicated staff and funding, from its other projects and voter-outreach efforts to address the burden imposed on voters by the doctor’s-certification requirement. MOVE would not have expended the staff resources and funds dedicated to the emergency telemedicine program but for the doctor’s certification requirement in Texas Election Code § 102.002.

On October 2, 2020, MOVE filed an application for a temporary injunction to enjoin the Clerk and the SOS from enforcing the § 102.002 doctor’s certification requirement for determining a voter’s eligibility for a late absentee ballot. App.2. After an evidentiary hearing on October 16, 2020, Travis County District Judge Tim Sulak determined that the doctor’s certification requirement violates the Texas Constitution’s Equal Protection guarantee because it places an improper disparate burden on voters who are diagnosed with COVID-19 after the deadline (and are thus eligible to claim a disability and vote absentee) as compared to those who are diagnosed before the deadline. App.1 p.2.<sup>1</sup> Judge Sulak also found that the doctor’s

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<sup>1</sup> The merits of the Injunction are not at issue in this motion for a temporary order, but attached are the SOS’s Plea to the Jurisdiction and MOVE’s response and brief in support of its application for a temporary injunction, together with its appendix of exhibits. App.3, App.4, App.5. These pleadings address threshold jurisdictional issues including standing and redressability. After an evidentiary hearing, the Injunction includes fact findings regarding MOVE’s organizational standing and its likelihood of success on the merits of its Equal Protection claim. App.1.

certification requirement “places a severe burden on the right to vote, and this is likely to burden primarily low-income and uninsured voters, and minority voters, effectively requiring a pay-to-play voting procedure.” *Id.* p.2. The court therefore enjoined the SOS and the Clerk from enforcing the doctor’s certification as follows:

“The Court therefore ORDERS:

15) Defendant DeBeauvoir to refrain from enforcing the physician’s certificate requirement of Texas Election Code § 102.002.

16) Defendant Hughs to refrain from enforcing the physician’s certificate requirement of Texas Election Code § 102.002, either directly or through the Attorney General as outlined in Texas Election Code § 31.005.

17) Defendant Hughs to refrain from advising county election officials to enforce the physician’s certificate requirement of Texas Election Code § 102.002 pursuant to her authority under Texas Election Code § 31.004.

18) Defendant Hughs to circulate a copy of this Order to the county election officials in each of Texas’s 254 counties via electronic mail within 24 hours from the time this ORDER is entered, in accordance with its duties under Texas Election Code §§ 31.003, 31.004, and 31.005.”

App.1 p.4.

The SOS filed a notice of interlocutory appeal to this Court, which automatically superseded the Injunction. MOVE asks this Court for temporary relief to reinstate the Injunction pending appeal.

### REQUEST FOR A RULE 29.3 TEMPORARY ORDER

This Court has inherent authority under Rule 29.3 “to make any temporary orders necessary to preserve the parties’ rights until the disposition of the appeal.” Tex. R. App. P. 29.3; *Tex. Educ. Agency*, 2020 WL 1966314, at \*5-6. This includes reinstating temporary injunctions to prevent irreparable harm to parties properly before the Court. *Id.* at \*6 (“[W]here the appellee alleges irreparable harm from . . . action that it seeks to preclude from becoming final, to effectively perform our judicial function and to preserve the separation of powers, we must exercise our inherent authority and use Rule 29.3 to make orders ‘to prevent irreparable harm to parties that have properly invoked [our] jurisdiction in an interlocutory appeal.’” (quoting *In re Geomet Recycling LLC*, 578 S.W.3d 82, 90 (Tex. 2019)); *see also*, *State v. Tex. Democratic Party*, No. 14-20-00358-CV, 2020 WL 3022949 (Tex. App.—Houston [14th Dist.] May 14, 2020, order) (“Texas Rule of Appellate Procedure 29.3 provides a mechanism by which we may exercise the scope of our authority over parties, including our inherent power to prevent irreparable harm to parties properly before us.”); *Tex. Gen. Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at \*2 (Tex. App.—Austin Jul. 31, 2020, order).

MOVE will suffer irreparable harm if this Court does not reinstate the Injunction during the pendency of this interlocutory appeal. The trial court made express fact findings in the Injunction regarding MOVE's irreparable injury: "MOVE is experiencing an ongoing injury and will imminently experience additional future injuries from the diversion of resources in order to mitigate the burden on voters caused by enforcement of § 102.002 and away from its regular mission priorities. MOVE is spending significant staff time and money to overcome the physician's certificate requirement. MOVE Texas has no adequate remedy at law to obtain money damages for its injuries, therefore its injuries are irreparable." App.1 p.3. Without an order from this Court reinstating the Injunction, MOVE will continue to suffer those injuries pending appeal.

This request for a temporary order is timely, and a temporary order will give meaningful relief because late absentee ballot applications and the doctor's certification are not implicated until Oct. 23, 2020, at the earliest. Even after Oct. 23, 2020, the Clerk testified by declaration that her process for evaluating late absentee applications will be the same whether or not the doctor's certification requirement is waived. There is thus no burden on the SOS if this Court grants temporary relief and reinstates the Injunction. In contrast, during the time the Injunction is superseded, MOVE must continue to divert its limited resources and funding to the emergency telemedicine program and has no adequate remedy at law



to obtain money damages for its injuries. MOVE's injuries are irreparable and can only be remedied by reinstating the Injunction.

For the foregoing reasons, MOVE respectfully prays that this Court grant it temporary relief under Rule 29.3 reinstating the Injunction pending appeal.

Respectfully submitted,

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**Attorneys for MOVE Texas Action Fund**

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served via email on counsel, as indicated below, on the 19th day of October, 2020.

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/s/ Jane Webre  
Jane Webre

### CERTIFICATE OF CONFERENCE

I certify that on Oct. 17, 2020, I conferred by e-mail with counsel for all parties regarding this motion. The respective counsel informed me that the Secretary of State opposes the relief sought through this motion, but the Clerk does not oppose the relief sought through this motion.

/s/ Jane Webre  
Jane Webre

# App. 1

**NO. D-1-GN-20-005507**

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
v.	§	
	§	
	§	OF TRAVIS COUNTY, TEXAS
DANA DeBEAUVOIR, in her official	§	
capacity as Travis County Clerk, and RUTH	§	
HUGHS, in her official capacity as Texas	§	
Secretary of State,	§	419th JUDICIAL DISTRICT
<i>Defendants.</i>	§	

**ORDER ON APPLICATION FOR TEMPORARY INJUNCTION**

On October 16, 2020, came to be heard the Plaintiff's Application for Temporary Injunction. The Court, having considered the application along with the supporting and opposing briefing and the applicable law cited therein, evidence presented, arguments of counsel, and the pleadings on file in this case, is of the opinion:

Defendants' Plea to the Jurisdiction is DENIED.

Plaintiff's Application for a Temporary Injunction should be GRANTED. The Court further FINDS:

- 1) Plaintiff MOVE Texas Action Fund ("MOVE") has demonstrated it has a probable right to relief for their claim that the requirement to obtain a doctor's certificate under Texas Election Code § 102.002 violates the Equal Protection Clause of the Texas Constitution on its face.
- 2) MOVE demonstrated it is likely to succeed on the merits of their claim that the requirement to obtain a doctor's certificate under Texas Election Code § 102.002 constitutes an undue burden on the fundamental right to vote.

- 3) Texas Election Code § 102.002 draws an arbitrary distinction between similarly situated voters who are or become disabled, as defined under Texas Election Code § 82.002, before the 11<sup>th</sup> day before the Election, and those who become disabled after the 11<sup>th</sup> day.
- 4) There is no rational basis to distinguish between these classes of voters. There is no evidence or reason to believe that an individual would be more likely to perjure themselves by fabricating a condition for the purposes of obtaining an absentee ballot on the 10<sup>th</sup> day before Election Day than on the 11<sup>th</sup> day.
- 5) The requirement to obtain a physician's certificate places a severe burden on the right to vote, and this is likely to burden primarily low-income and uninsured voters, and minority voters, effectively requiring a pay-to-play voting procedure.
- 6) Individuals who, after the mail-in ballot application deadline, acquire a disability will not always see a physician as a result of that disability.
- 7) Particularly during the time of the COVID-19 pandemic, the requirement to obtain a physician's certificate presents a severe burden. Many thousands of individuals may obtain a positive COVID-19 test through third-party providers between the mail ballot application deadline and Election Day, and may not actually visit or speak with a physician as part of that test. These voters will have to spend extra time and money obtaining a physician's certificate, and, as the evidence demonstrates, may still be unable to do so.
- 8) For individuals who are not able to obtain a physician's certificate, they must either face disenfranchisement or risk injury to their health, while voters with the exact same condition are not required to make this choice if their disability originates before the mail-in ballot deadline.

- 9) The physician's certification requirement injures the public interest, as forcing disabled voters out of quarantine will further put at risk the election workers who must assist them in voting, and the general public at large. This finding is supported by mandatory orders and guidelines issued by State and federal executive and public health agencies relating to COVID-19, including the requirement to self-quarantine or isolate after a positive diagnosis of COVID-19.
- 10) MOVE is currently suffering an ongoing injury and will be further injured in the future because of its direct response intended to counteract the probable unconstitutionality of Texas Election Code § 102.002 and the burden it puts on voters.
- 11) MOVE is experiencing an ongoing injury and will imminently experience additional future injuries from the diversion of resources in order to mitigate the burden on voters caused by enforcement of § 102.002 and away from its regular mission priorities. MOVE is spending significant staff time and money to overcome the physician's certificate requirement.
- 12) MOVE Texas has no adequate remedy at law to obtain money damages for its injuries, therefore its injuries are irreparable.
- 13) There is no burden placed on Defendants by a temporary injunction to prevent enforcement of the onerous and unconstitutional doctor's certification provision, and in fact, local election officials are likely to be relieved of administrative burden by enjoining the provision. Evidence from Defendant DeBeauvoir indicates that it is more burdensome on counties to comply with the requirement for a physician's certificate than to follow the same procedure that is in place for all other mail ballots which allows voters to self-certify to the requisite physical condition to qualify for an emergency ballot.
- 14) The harm to Plaintiff MOVE Texas outweighs the burden, if any, on Defendants.

The Court therefore ORDERS:

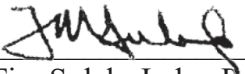
- 15) Defendant DeBeauvoir to refrain from enforcing the physician's certificate requirement of Texas Election Code § 102.002.
- 16) Defendants Hughs to refrain from enforcing the physician's certificate requirement of Texas Election Code § 102.002, either directly or through the Attorney General as outlined in Texas Election Code § 31.005.
- 17) Defendant Hughs to refrain from advising county election officials to enforce the physician's certificate requirement of Texas Election Code § 102.002 pursuant to her authority under Texas Election Code § 31.004.
- 18) Defendant Hughs to circulate a copy of this Order to the county election officials in each of Texas's 254 counties via electronic mail within 24 hours from the time this ORDER is entered, in accordance with its duties under Texas Election Code §§ 31.003, 31.004, and 31.005.

It is further ORDERED that for this Temporary Injunction Order to be effective under the law, cash bond in the amount of \$10 shall be required of Plaintiff and filed with the District Clerk of Travis County, Texas. The Clerk of Court shall forthwith issue a writ of Temporary Injunction in conformity with the law and terms of this Order. Once effective, this Order shall remain in full force and effect until final judgment in the trial on this matter.

The Court ORDERS a final trial on this matter to begin on November 16, 2020 at 9:00 a.m., unless the parties and the Court find a mutually agreeable alternate date.



SIGNED and ENTERED at 2:45p.m. on October 16, 2020.

  
\_\_\_\_\_  
Tim Sulak, Judge Presiding

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Associated Case Party: Ruth Hughes, Texas Secretary of State

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# App. 2

**NO. D-1-GN-20-005507**

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
v.	§	
	§	
	§	OF TRAVIS COUNTY, TEXAS
DANA DeBEAUVOIR, in her official	§	
capacity as Travis County Clerk, and	§	
RUTH HUGHS, in her official capacity	§	
as Texas Secretary of State,	§	419th JUDICIAL DISTRICT
<i>Defendants.</i>	§	
	§	

**PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION**  
**AND APPLICATION FOR TEMPORARY INJUNCTION**

The COVID-19 pandemic has highlighted many disparities in our country. This case addresses one particular disparity stemming from a confluence of the pandemic and a constitutionally infirm statute in Texas—Section 102.002 of the Texas Election Code.

Under provisions of the Texas Election Code, a Texan registered to vote can request an absentee ballot by an application certifying that they meet one of the statutory criteria for voting absentee. *See* Tex. Elec. Code §§82.001-.004. A voter can self-certify that they meet one of the statutory criteria so long as they submit their completed application for an absentee ballot by the eleventh day before the election. *Id.* §84.007(c). The voter does not need to do more than check a box; neither an explanation nor any third-party verification is required. Yet if a voter gets sick *after* the deadline has passed to apply for an absentee ballot, a different, more burdensome procedure applies. *See id.* §102.001. A voter under those circumstances can apply for a late ballot, but rather than self-certifying that they meet the statutory criteria, the voter must have a doctor's certification—containing specific

statutory language—establishing that the voter has a sickness that began after the deadline for applying for an absentee ballot that prevents them from voting in person. *Id.* §102.002. For the voter who happens to get sick after the vote-by-mail application deadline, the burden is thus much greater to vote absentee.

Election Day—November 3, 2020—will be significant, and it will occur in the middle of the unprecedented COVID-19 pandemic that has already killed more than 16,132 Texans and sickened more than 787,271. The Supreme Court of Texas has held that the lack of immunity to COVID-19 is not itself a sufficient disability to satisfy the statutory criteria for voting absentee. *In re State*, 602 S.W.3d 549, 560 (Tex. 2020). But what if a voter is diagnosed with COVID-19 after the deadline has passed to request an absentee ballot? As of the time this suit was filed, 96 new cases of COVID-19 are confirmed in Travis County every day. If that average holds, more than 1,000 people will be confirmed with COVID-19 between the deadline to apply for an absentee ballot (October 23) and Election Day in Travis County alone; the numbers are much greater state-wide. All of those voters would qualify for an absentee ballot, but the burden to apply for one is significantly greater than the burden to apply for a regular absentee ballot because of the statutory requirement of a doctor's certification. In many instances that burden will prove too heavy, the cost too high, and the quarantined voter will be disenfranchised as a result.

Because that disparate burden violates the Equal Protection clause of the Texas Constitution, Plaintiff MOVE Texas Action Fund files this suit challenging the doctor's certification requirement for late absentee ballot applications for voters who are diagnosed with COVID-19 after the deadline to seek a regular ballot. But as a simpler, statutory-

construction matter, the current COVID-19 mandatory quarantine orders issued by public health entities satisfy the statutory requirement for a doctor's certification.

Under either the statutory basis or a constitutional challenge, this Court should render relief that voters who are diagnosed positive with COVID-19 after the eleven-day cutoff may secure an absentee ballot with self-certification only and need not obtain a doctor's certification as well.

### **DISCOVERY CONTROL PLAN**

Pursuant to Texas Rule of Civil Procedure 190.1, Plaintiffs intend to conduct discovery under Discovery Level 3.

### **PARTIES**

Plaintiff MOVE Texas Action Fund ("MOVE") is a Texas nonprofit corporation, organized under section 501(c)(4) of the Internal Revenue Code, with its principal place of business in San Antonio, Texas. MOVE empowers underrepresented youth communities to build a better democracy through voter engagement, leadership development, and issue advocacy. In pursuing these organizational goals, MOVE registers tens of thousands of people to vote in this State, including in Travis County, every year. As elections approach, MOVE performs significant outreach by various means in order to turn newly registered voters into life-long voters and to provide those voters with resources and information to make voting easy and accessible for them.

Defendant Dana DeBeauvoir is the Travis County Clerk and is sued in her official capacity only. DeBeauvoir's duties include conducting elections for Travis County, as well

as qualifying applications for ballot by mail and late absentee ballots. She may be served with process at the County Clerk's office located at 1000 Guadalupe Street, Austin, TX 78701. At all times relevant hereto, DeBeauvoir has been acting under color of statutes, ordinances, regulations, customs and usages of the State of Texas and Travis County, Texas.

Defendant Ruth Hughs is the Texas Secretary of State and is sued in her official capacity only. Hughs is the chief elections official for the State of Texas and is thereby charged with enforcing the provisions of the Texas Election Code, advising and educating county officials regarding their obligations pursuant to Texas Election Code and other voting laws, and protecting the voting rights of all Texas voters. Specifically, Hughs has the statutory, non-discretionary duties to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code" and "assist and advise all election authorities" regarding the same. Tex. Elec. Code §§31.003, .004. Those express duties encompass an obligation to ensure that all local county election officials properly apply the requirements of the absentee ballot application process. Hughs may be served with process at the office of the Texas Secretary of State located at the James E. Rudder Building, 1019 Brazos Street, Room 105, Austin, Texas 78701.

### **JURISDICTION AND VENUE**

MOVE seeks non-monetary, declaratory and injunctive relief through this suit. This Court has jurisdiction to render such declaratory and injunction relief pursuant to Texas



Civil Practice and Remedies Code §§37.001, *et seq.* and 65.001, *et seq.*, and Texas Election Code §273.081.

Travis County is a proper venue for this lawsuit because MOVE serves Travis County residents and the actions of which MOVE complains occurred and are occurring in Travis County. *See* Tex. Civ. Prac. & Rem. Code § 15.002.

### **FACTS**

The issue of a late diagnosis of COVID-19 and the burden of securing a doctor's certification under those circumstances has been the subject of prior litigation in Travis County before the primary runoff in July 2020. *See* D-1-GN-20-003647. In the prior case, the individual plaintiffs were registered voters in Travis County, Texas. They were tested for COVID-19 after experiencing symptoms of the disease, including coughing and congestion, and confirmed that they were positive for COVID-19. The plaintiffs could not visit a polling location in person to vote without a likelihood of injuring their health and spreading disease to other non-infected individuals. The plaintiffs filed suit seeking injunctive relief so that they could secure absentee ballots without the significant burden of securing the doctor's certification, which was an insurmountable hurdle preventing their ability to exercise their right to vote in the primary. Without a hearing, a visiting judge denied their request for injunctive relief relating to the primary election. MOVE files this suit seeking injunctive relief so that similarly-situated voters are not denied their ability to vote in the general election in November, and so that MOVE can dedicate its resources to voter outreach for underrepresented youth communities rather than diverting them to an

emergency ballot telemedicine program necessitated by Section 102.002 of the Texas Election Code.

The deadline to apply for a regular mail-in ballot because of a disability is 11 days prior to Election Day. Tex. Elec. Code §84.007(c). If an illness arises after this deadline, a voter can vote absentee only by applying for a late absentee ballot. *See id.* §102.001 *et seq.* To apply for this late absentee ballot, the voter also must submit a doctor's certification of the claimed illness—a requirement that is not imposed on regular mail-in ballot voters. *Id.* at 102.002; *see In re State*, 602 S.W.3d at 561 (“Indeed, the Legislature rejected the requirement of a physician’s proof of disability for mail-in voting applications [submitted before the deadline] when it amended the Election Code in 1981. And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason for seeking a ballot by mail is a disability.”).

Accordingly, if a voter tests positive for COVID-19 before the deadline, that voter would generally be entitled to self-identify as having a disability qualifying for mail-in ballot eligibility, permitting them to vote while remaining in quarantine and resting pursuant to standard medical recommendations. But a voter with the exact same diagnosis, evidenced by a positive test result received at or near the deadline to apply for mail-in ballot, is required to incur the additional burden and expense of obtaining a doctor’s certification.

The additional requirement that a voter secure a physician’s certification of their disability disenfranchises voters who do not have an established primary care physician, who are uninsured, who cannot afford medical care, who are too sick to visit a doctor’s

office in person, who are unable to access medical care free of charge, and who—even if they can contact a physician—cannot get a timely appointment in the narrow window in which they need to request a late absentee ballot.

Based on current data, several thousand Texans are diagnosed with COVID-19 every day.<sup>1</sup> If this trend holds through the 2020 general election, more than 35,000 individuals will receive a positive COVID-19 test result after the deadline to apply for a regular mail-in ballot (October 23, 2020) and before Election Day (November 3, 2020).

Voters most affected by the inability to obtain a doctor certification are low-income voters, those without medical insurance, and those without an existing regular primary care physician relationship. These voters are disproportionately racial minorities and/or people of color. Additionally, CDC statistics indicate that positive COVID-19 test results are also disproportionately in communities of color.

In accordance with its mission to assist voters and protect access to the ballot, including in conditions precipitated by the COVID-19 pandemic, MOVE has spent significant organizational resources, diverted from other projects and voter outreach efforts, to address the burden caused to voters by the Texas Election Code's doctor certification requirement for voters who may be diagnosed with COVID-19 after the

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<sup>1</sup> The Texas Department of Health and Human Services statistics regarding COVID-19 cases numbers are available at <https://www.dshs.state.tx.us/coronavirus/> (last visited Oct. 1, 2020). There were 3, 234 new COVID-19 cases in Texas on Oct. 1, 2020. Notably, this number likely understates the true number of infected individuals because increasingly popular rapid antigen tests are not included in the state's positive test counts. See <https://www.houstonchronicle.com/news/investigations/article/Thousands-of-Texans-are-getting-rapid-result-15452709.php> (last visited Oct. 2, 2020).

deadline to apply for a regular absentee ballot. Specifically, MOVE has dedicated staff and funds to an emergency ballot tele-medicine program that will provide individual voters free and remote access to a physician to assist them in obtaining a doctor’s certification if the physician determines that a certification is appropriate. Attached as Exhibit 1 to this petition is a summary of MOVE’s Texas Emergency Ballot Telemedicine Program. It details the planning and process MOVE has developed to assist voters who may be diagnosed with COVID-19 after the October 23 deadline so that they can secure qualifying doctor’s certifications and exercise their rights to vote through late absentee ballots. MOVE would not have expended the staff resources and funds dedicated to this program but for the Texas Election Code’s distinction between dates that a voter can self-certify their disability and dates where a physician must certify that disability.

**REQUEST FOR DECLARATORY JUDGMENT**  
**REGARDING STATUTORY PROVISIONS**

State and federal executive and public health agencies have issued mandatory orders and guidelines relating to COVID-19, including the requirement to self-quarantine or isolate after a positive diagnosis of COVID-19. These orders and guidelines include:

1. Austin Public Health (“APH”) adopted Health Advisory Rules on August 14, 2020, that are in effect until November 12, 2020. Rule 2.4.3.3 of the applicable APH Rules mandates that an individual who has tested positive for COVID-19 shall “remain in home quarantine for at least 10 days after symptoms first appeared, at least 24 hours with no fever without fever-reducing medication, and symptoms have improved.” The APH order is

available at: <https://www.austintexas.gov/sites/default/files/files/Health/8-14-20-Emergency-Rules-Adoption-Notice-Health-Authority-Rules.pdf>.

2. Texas Governor Greg Abbott issued Executive Order GA-32, which provides that individuals should comply with “minimum standard health protocols from the Texas Department of State Health Services (DSHS).” DSHS protocols, in turn, advise a quarantine period and rely on Guidelines issued by the Centers for Disease Control (“CDC”), which are discussed below. GA-32 is available at:

[https://gov.texas.gov/uploads/files/press/EO-GA-32\\_continued\\_response\\_to\\_COVID-19\\_IMAGE\\_10-07-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf).

3. The federal Centers for Disease Control (“CDC”) has issued guidelines, updated September 10, 2020, stating that persons who have been diagnosed with COVID-19 or are exhibiting symptoms should quarantine: “Do not leave your home except to get medical care. Do not visit public areas.” The CDC guidelines are available at: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>.

Under these orders and guidelines, a voter who tests positive for COVID-19 after the 11-day cutoff must quarantine at home and cannot leave home to secure a doctor’s certification for purposes of the late absentee ballot or to vote in person. The orders and guidelines reflect a determination by public health authorities that a positive diagnosis of COVID-19, on its own, requires that the person remain in quarantine. Moreover, the APH and Governor’s orders are mandatory and subject to civil enforcement.

MOVE seeks a declaratory judgment that a positive diagnosis of COVID-19, in light of the applicable public health and executive orders and guidelines requiring quarantine for

persons who have tested positive for COVID-19, satisfy the statutory requirement for a doctor's certification under Section 102.002 of the Texas Election Code. That is because a positive diagnosis within the pertinent time frame by definition would "prevent [the voter] from appearing at the polling place for an election" to be held within 11 days or fewer. Applying the orders to satisfy the doctor's certification requirement would allow a voter to secure an absentee ballot based on a self-certification.

The Secretary of State has acknowledged as much, earlier this year issuing guidance to local election officials suggesting that quarantine orders can properly support a waiver of the doctor's certification requirement for purposes of securing a late absentee ballot:

Expanding Eligibility Requirements Under Chapter 102 (Late Voting for Sickness or Physical Disability): A court order could provide for a temporary expansion of the eligibility requirements for Chapter 102 voting to allow voters in quarantine to vote in this fashion. This option would also require the court, in some instances, to temporarily waive or modify the requirement for a physician's signature on the application for this type of late ballot for purposes of any election(s) impacted by COVID-19.

Secretary of State Election Advisory 2020-14 dated April 6, 2020, available at: <https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml>.

Construing Section 102.002 in this way would ensure that any voter who is diagnosed with COVID-19 after the 11-day cutoff will be able to self-certify as to a disability and secure an absentee ballot based on the applicable public health orders. Moreover, it would do so on the basis of the terms of the statute rather than a constitutional infirmity. Indeed, if this Court construes Section 102.002 in this way, and declares that the existing executive and public health orders satisfy the requirement for a doctor's

certification for purposes of the late ballot application, it need not address the Equal Protection challenge discussed below as to voters who test positive with COVID-19.

**REQUEST FOR DECLARATORY JUDGMENT**  
**REGARDING CONSTITUTIONAL CHALLENGE**

In the alternative, MOVE seeks a declaratory judgment that the requirement of a doctor's certification to secure a late absentee ballot pursuant to Texas Election Code §102.002 is unconstitutional as applied to voters who are diagnosed with COVID-19 after the deadline for a regular application to vote by mail. This declaration is warranted because the requirement violates the Equal Protection Clause of the Texas Constitution and because it imposes undue burdens on the fundamental right to vote.

**A. Defendants' Actions Violate the Equal Protection Clause of the Texas Constitution.**

The Election Code's failure to provide voters with the same opportunity to self-identify their eligibility for an absentee ballot both before and after an arbitrary date violates the guarantees of equal protection in the Texas Constitution. *See* Tex. Const. Art. I, § 3; *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 621 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002) (“The legal standard for the equal-protection analysis under article I, section 3 of the Texas Constitution is the same as the legal standard for the analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”)).

MOVE is highly likely to prevail on the merits of its Equal Protection Clause claim. The Supreme Court has held that imposing different absentee ballot restrictions on similarly situated voters raises Equal Protection Clause concerns. In *O'Brien v. Skinner*,

414 U.S. 524 (1974), the Supreme Court struck down as unconstitutional a scheme that arbitrarily denied mail-in ballots to certain classes of individuals who were unable to vote in person while affording that opportunity to others. *Id.* at 530; *see also Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (finding a violation of the Equal Protection Clause where the State allowed members of the military to vote early in person the three days prior to the Election, but not other voters).

In this instance, the Texas Election Code arbitrarily distinguishes between two groups of voters who are unable to vote in person and must vote absentee to avoid disenfranchisement. In one group are individuals who claim a qualifying disability under Section 82.002 prior to the cut-off for applying to vote by mail. These individuals may self-attest to their disability under Texas Election Code Section 82.002. In the other group are individuals who develop a qualifying illness or disability *after* the cutoff for applying to vote by mail. Despite being equally situated in their inability to vote in person and their qualifications for an absentee ballot under Texas Election Code Section 82.002, these individuals are subject to the separate, unequal and burdensome requirement that they obtain “a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner.” Tex. Elec. Code 102.002. This arbitrary discrimination between these two groups is an unconstitutional violation of Texas’ equal protection clause.

Further, in the current circumstances with the COVID-19 pandemic raging, this requirement imposes an extreme burden on voters. In the prior suit before this Court, the individual plaintiffs were diagnosed with COVID-19 through a service that is separate from their normal medical practitioner. Such tests are regularly available through government



entities at no cost or at low cost through private companies and pharmacies. But, the Texas Election Code does not permit an in-hand test result or any other proof of disability as sufficient to qualify for an emergency ballot. And even if it did, individuals must often wait anywhere from five to seventeen days to take and receive results of a polymerase chain reaction (PCR) test—currently the only type of test that the Texas Department of State Health Services counts among its positive COVID-19 test count.<sup>2</sup>

Indeed, COVID-19 has caused a great strain on the medical systems in Texas, making it particularly difficult to get in touch with, and schedule an appointment with, a physician. Moreover, voters with COVID-19 are also generally unable to visit their doctor in person because of their quarantine.

**B. Defendants’ Actions Violate the Constitutional Protections of the Fundamental Right To Vote.**

The requirement for a doctor’s certification under Tex. Elec. Code §102.002 will disenfranchise voters and serve no corresponding governmental interest. The certification requirement represents an undue burden on the fundamental right to vote as protected by the Texas Constitution, and it is unconstitutional on its face.

The right to vote is a fundamental constitutional right, protected under the Equal Protection Clause from undue burden. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (describing the right to vote as “too precious, too fundamental” to be burdened

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<sup>2</sup> See <https://www.kxan.com/news/texas/delays-in-test-results-continue-to-plague-texans-as-gov-abbott-says-state-is-working-on-quicker-turnaround/>.

or conditioned); *see also State v. Fletcher*, 50 S.W.2d 450, 452 (Tex. Civ. App. 1932), writ dismissed (“The right to vote is a constitutional right”). The right is “protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). It also “applies when a state either classifies voters in disparate ways . . . or places restrictions on the right to vote.” *Obama for Am.*, 697 F.3d at 428.

When assessing an Equal Protection challenge to a state restriction on the right to vote, courts scrutinize the restriction using a standard established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under the *Anderson-Burdick* standard, a court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *see also Harper*, 383 U.S. at 670 (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

This court should be guided by the approach taken repeatedly by federal courts, applying the *Anderson-Burdick* standard in cases involving a range of voting rights and election administration issues. In *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), the Supreme Court “reaffirmed *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to

vote against the ‘precise interests put forward by the [s]tate as justification for the burden imposed by its rule.’” *Id.* at 190-191 (quoting *Anderson*, 460 U.S. at 789). Likewise, in *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009), the Fifth Circuit noted that *Anderson* and *Burdick* “balance the individual’s rights against state-imposed requirements.” *Id.* at 168 n.6; *see also Wilson v. Birnberg*, 667 F.3d 591, 598 (5th Cir. 2012). And, even more recently, the Sixth Circuit explained that the *Anderson-Burdick* standard is “sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote.” *Obama for Am.*, 697 F.3d at 429 (rejecting defendants’ request for application of a different standard for reviewing a voting restriction).

The Texas Election Code provisions, as administered by Defendants, effectively treats voters who were diagnosed with the same illness just a few days prior in a different manner, allowing one to self-attest to their illness while requiring the other to obtain a doctor’s certification, imposing additional burdens and costs. *Obama for Am.*, 697 F.3d at 431-32, 436 (finding early voting state restriction unjustifiably burdened non-military voters, and, thus, violated the Equal Protection Clause); *Anderson*, 460 U.S. 786-806. Voters diagnosed with COVID right after the deadline to apply for an absentee ballot would be subject to the doctors’ note requirement that, under the circumstances, is extraordinarily difficult or impossible for them to satisfy. The harm of disenfranchisement outweighs whatever plausible interest Defendants could claim in requiring a notarized doctors’ note to verify the voters’ illness in this time of global pandemic, much less a sufficiently

important one that might justify depriving the voters of their right to vote. *Stringer, et al. v. Pablos, et al.*, 320 F.Supp.3d 862, 900 (W.D. Tex. 2018).

### **APPLICATION FOR TEMPORARY INJUNCTION**

#### **A. MOVE has a “strong likelihood” of success on the merits.**

For the reasons stated above, MOVE is highly likely to prevail on the merits of its claims that the public health orders satisfy the requirement for a doctor’s certification and that the Texas Election Code provisions at issue are unconstitutional on their face and as applied to MOVE.

#### **B. MOVE will be irreparably harmed by Defendants’ actions.**

“An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Only declaratory and injunctive relief are available to MOVE at law, therefore its injuries are necessarily non-compensable.

Due to Defendants’ violations, MOVE will suffer irreparable harm from having to allocate its scarce resources to assist voters in securing doctors’ certifications in order to secure late absentee ballots. MOVE’s interest is intimately related to the interest of Texas voters, who will suffer irreparable harm by having their constitutionally and statutorily protected right to vote infringed during the November 3, 2020 general election. *Williams v. Salerno*, 792 F.2d 323, 326 (2nd Cir. 1986) (plaintiffs suffer irreparable harm if their right to vote is impinged upon); *Obama for Am.*, 697 F.3d at 436 (“A restriction on the fundamental right to vote . . . constitutes irreparable injury”). There is no question that the

imminent threat of disenfranchisement constitutes an irreparable injury, as voting is a fundamental right and the loss of that right cannot be remedied by monetary damages. Indeed, “the right to vote is not something that can ordinarily be replaced by any amount of money.” *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at \*4 (D. N.D. Oct. 21, 2010).

“Once a citizen is deprived of his right of suffrage in an election there is usually no way to remedy the wrong. There is no process for ordering ‘re-votes’ . . . Once an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election.”

*Id.* at 5; *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce [an] election occurs, there can be no do-over and no redress.”).

### **C. The Injuries Outweigh any Alleged Injuries to the County or the State**

There are no costs associated with waiving the doctors’ certification requirement of the emergency voting practices to allow voters with a late COVID diagnosis to apply for a ballot. There is no apparent state interest in requiring this certification, apparent by the fact that similar certification is not required for any other voter who votes absentee.

### **D. A Temporary Injunction Would Serve the Public Interest**

The public interest lies in greater voter participation and access to the polls, and lies in MOVE’s favor. This is particularly true here, where tens of thousands of Texans will likely be diagnosed with COVID-19 after the October 23 deadline for a vote-by-mail ballot. *See Husted*, 697 F.3d at 437 (public interest favors permitting as many qualified voters to vote as possible); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 184 (1979) (“voting is of the most fundamental significance under our constitutional

structure.”). Granting this petition will ease voting for all of these sick Texans and will create a regulatory scheme that better promotes equal access for all Texans.

#### **E. Request for Relief**

For all the foregoing reasons, MOVE respectfully requests that this Court grant its application for a temporary injunction, enjoin the Defendants from enforcing the doctor’s certification provision of the Texas Election Code in determining a voter’s eligibility for an emergency absentee ballot.

#### **PRAYER**

THEREFORE, MOVE respectfully prays for the following relief: judgment against Defendants in the form of declaratory relief declaring that the requirement for a physician’s certificate under Tex. Elec. Code Section 102.002 is satisfied by the existing public health orders regarding quarantine as to any voter who is diagnosed positive for COVID-19 after the 11-day cutoff; in the alternative, that the statutory doctor’s certification requirement is unconstitutional on its face and as applied to MOVE, and an injunction ordering Defendants to accept and process late ballot applications without a physician’s certificate, and to advise Counties across the state regarding this requirement of the Constitution.

Hearing is set on this matter on October 16, 2020, at 9:00 a.m. at the Travis County District Court to be conducted through Zoom technology.

Dated: October 9, 2020.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing pleading was served electronically on counsel, as indicated below, on the 9th day of October, 2020.

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# **EXHIBIT 1**



## Texas Emergency Ballot Telemedicine Program MOVE Texas Action Fund

### About MOVE Texas Action Fund

MOVE Texas Action Fund is a 501(c)(4) grassroots, nonpartisan nonprofit organization building power for underrepresented youth communities through civic education, leadership development, and issue advocacy.

### The Problem: Texas' Onerous Emergency Ballot Law

Texas is a state of Black and Latino young people: 41% of Texans are under the age of 30 years old and of this group, 63% are people of color. Since March 2020, COVID-19 has spread quickly across the state and has impacted Black and Latino communities the hardest. Young Texans, vital to the state's economy and the majority of higher education's population, have remained on the razor's edge of contracting COVID-19.

In normal times, Texas makes voting difficult. In the middle of a global pandemic and during one of the most important election cycles of our generation, voting in Texas for young people of color will be harder than ever this November. The Texas Supreme Court refused to explicitly expand voting by mail to individuals under the age of 65 years old, instead opting for a "don't ask, don't tell" system instructing voters to make their own decision to employ the disability option. Meanwhile, Texas Attorney General Ken Paxton has threatened civic organizations and voters with criminal voter fraud charges if vote by mail via disability is widely utilized, chilling communication and participation to voters in need across the state. Texas is now the largest in-person voting state in the nation.

Because Texas' primary election was held in early March 2020, the impacts of COVID-19 were not felt during an election cycle until the primary runoff elections in early July. For the first time, Texas saw voters contract the novel coronavirus *during* early voting. For these voters, the risk of disenfranchisement was skyhigh. Because the vote by mail deadline occurs eleven (11) days before Election Day, these voters had two options: 1) Vote in-person at a polling location while contagious and risk infecting other voters and poll workers, or 2) Request an emergency ballot.

To request an emergency ballot in Texas, voters must prove their illness or disability occurred after the vote by mail deadline to their local county election department. Texas Election Code requires the voter to obtain a signed waiver by a "physician, chiropractor, or practitioner" ([Texas Election Code Sections 102.001 & 102.003](#)).



"This is to certify that I know that \_\_\_\_\_ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after \_\_\_\_\_.

"Witness my hand at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
(signature of physician,  
chiropractor, or practitioner)"

Voters who opted to employ their legal right to an emergency ballot in Texas were faced with nearly insurmountable obstacles:

- Obtaining a waiver from a physician was nearly impossible due to the inability to get an appointment within a matter of days due to COVID-19 infection rates and safety protocols;
- For those who could see a doctor, there were co-pays or out-of-pocket expenses incurred to obtain the waiver;
- Voters then had to find a representative, risking this person's health, to submit the emergency ballot application and signed waiver in-person at the local elections office;
- The representative then had to return the emergency ballot in person to the voter to be completed and sealed;
- Once sealed, only the representative who applied for the emergency ballot for the voter could return it to the local elections office, further risking infection and spread of COVID-19.

On July 14, 2020, the Texas Civil Rights Project (TCRP) filed a lawsuit against the Travis County Clerk on behalf of two voters, Linda Elizabeth Harrison and Vernon Webb, who both tested positive for COVID-19 and were unable to obtain emergency ballots to exercise their right to vote. Elizabeth and Vernon could not vote in person without potentially exposing others to the virus and thus risking additional lives in the process. They were both confirmed positive for COVID-19 after the deadline to apply for a vote by mail ballot and were unsuccessful in navigating the State's extremely burdensome process for obtaining an emergency ballot.

The Texas emergency ballot system is unfair, unjust, and because of our capitalist healthcare system, equates to a poll tax. If nothing is done, this will disenfranchise thousands and thousands of voters in late October and early November during this important Presidential election.



David Waldman-1, of Yorktown LLC™  
@KagroX

Replying to @KagroX

Top ten state reports of new cases of COVID-19, 9/27:

1. Texas +4,085
2. California +3,166
3. Wisconsin +1,726
4. Illinois +1,709
5. Kansas +1,571
6. Michigan +1,329
7. New York +996
8. Ohio +934
9. Missouri +924
10. Minnesota +904



The Center for Disease Control and Prevention has warned COVID-19 and influenza this fall will increase infection rates, and Texas is already seeing the early warning signs. As of late September 2020, COVID-19 cases in Texas are rapidly increasing, growing faster than any other state in the nation. Because young people have been forced to continue working and going to college, these Texas voters are most at risk to contract COVID-19. Young voters are often forced to learn voting systems without the support of state civic education programs. If forced to vote by emergency ballot, these voters will most certainly be disenfranchised, leaving our generation silenced at the ballot box in the most important election of our generation.

### **The Solution: Expand Access to Emergency Ballots Virtually By Telemedicine**

Obtaining no-cost access to a physician who can determine if an emergency ballot waiver should be issued is the important point of access to helping eligible voters in need during the final days of the election this year.

MOVE Texas Action Fund will build a volunteer doctor telemedicine system to support these young, low-income voters of color in the final eleven days before Election Day. This system will be available to all Texans from October 23, 2020 through November 3, 2020.

#### **Program User Design**

- Client calls a toll-free number advertised through social media and Election Protection networks (i.e. 888-911-VOTE);
- Client gives basic contact information, voting status, and schedule availability to one of two paid MOVE Texas part-time employees (Staff Member) via [Grasshopper](#);
- Staff Member schedules [Zoom](#) meeting with a volunteer physician, chiropractor, or practitioner (Physician), preferably within 24 hours;
- Staff Member sends liability waiver via [DocuSign](#) and appointment information to Client and Physician;
- At the scheduled appointment time, Client and Physician meet via Zoom video call to discuss the emergency ballot waiver. MOVE Texas does not have any access to any medical information or records nor does not control the determination of the outcome of the meeting.
- If approved, the Physician issues the signed waiver via email to the Client. If not approved, the Physician issues a denial letter.
- Staff Member keeps an internal record of if the Client attended the appointment as scheduled.

Due to the sensitive nature of this work, MOVE Texas Executive Director H. Drew Galloway will personally lead this program. He will be supported by Executive Associate Mia Balderas and two paid Legal Interns.



### Program Goals and Outcomes

Through this program, we will help at least 500 eligible voters connect with volunteer physicians to expand their access to the emergency ballot. We anticipate the cost per vote to be \$42.

### Program Budget

<i>Category</i>	<i>Item</i>	<i>Cost</i>
Payroll	Executive Director	\$3,710
Payroll	Executive Associate	\$1,760
Payroll	Legal Interns	\$3,750
Technology	Grasshopper Telephone System	\$250
Technology	Zoom Conference System	\$400
Technology	Docusign	\$400
Legal	Healthcare Lawyer Fees	\$2,500
Legal	Election Lawyer Fees	\$2,500
Advertising	Social Media Advertisement	\$5,000
Advertising	Election Protection Outreach	\$1,000
Advertising	Volunteer Doctor Recruitment	\$500
Total		\$21,370

# App. 3

## CAUSE NO. D-1-GN-20-005507

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
DANA DEBEAUVOIR, in her official capacity	§	
as Travis County Clerk, and RUTH HUGHS,	§	
in her official capacity as Texas Secretary	§	
of State	§	
<i>Defendants.</i>	§	419TH JUDICIAL DISTRICT

**DEFENDANT SECRETARY OF STATE’S PLEA TO THE JURISDICTION AND RESPONSE IN  
OPPOSITION TO APPLICATION FOR TEMPORARY INJUNCTION**

**INTRODUCTION**

MOVE Texas Action Fund (“MOVE”), a § 501(c)(4) corporation, seeks a temporary injunction against Texas Election Code § 102.002, naming the Texas Secretary of State (“Secretary”) as a defendant. Section 102.002 requires a voter to provide certification from a “licensed physician or chiropractor or accredited Christian Science practitioner” in order to vote a late ballot on disability grounds. TEX. ELEC. CODE § 102.002. MOVE argues that § 102.002 violates the Equal Protection Clause of the Texas Constitution “as applied to voters who are diagnosed with COVID-19 after the deadline for a regular application to vote by mail.” Am. Pet. at 11. In the alternative, MOVE argues that “current COVID-19 mandatory quarantine orders issued by public health entities satisfy the statutory requirement for a doctor’s certification.” Am. Pet. at 2. MOVE asks the Court, under either theory, to “render relief that voters who are diagnosed positive with COVID-19 after the eleven-day cutoff may secure an absentee ballot with self-certification only,” and without complying with § 102.002. Am. Pet. at 3.



## SUMMARY OF THE ARGUMENT

The Court should dismiss MOVE's case against the Secretary for lack of jurisdiction for at least three independent reasons.<sup>1</sup>

- **First**, MOVE lacks standing. MOVE cannot sue as a representative of any voter, because it does not represent any voter (let alone a voter with standing in their own right). And MOVE cannot independently sue, because Texas courts do not recognize standing based upon voluntary expenditures, which is all MOVE alleges here.
- **Second**, this case is nonjusticiable because it is unripe and because it seeks an impermissible advisory opinion.
- **Third**, the Secretary's immunity bars MOVE's case against her because MOVE has not alleged a viable claim.

Moreover, the Court should deny MOVE's application for a temporary injunction, because MOVE cannot make the showing required for that extraordinary remedy to issue. This is particularly so where, as here, the election that would be impacted by MOVE's request is, for all practical purposes, already underway.

## STATUTORY BACKGROUND

Under the Election Code, Texans who are registered to vote may cast their ballot by mail if they meet one of four criteria on election day: absence from county of residence, disability, age of 65 or older, or confinement in jail. TEX. ELEC. CODE §§ 82.001–.004. Mail-in ballot applications must be submitted to local early voting clerks,<sup>2</sup> who are responsible for administering early voting, not later than the eleventh day before the election. *Id.* § 84.007. As relevant here, a voter may vote by mail under the definition of “disability” if the “voter has a sickness or physical condition that

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<sup>1</sup> Should this case continue, the Secretary reserves the right to raise additional jurisdictional arguments.

<sup>2</sup> In most state- and county-wide elections, the county clerk or county elections administrator serves as the early-voting clerk. TEX. ELEC. CODE §§ 83.002, 31.043. *See also Election Duties*, TEXAS SECRETARY OF STATE, *available at* <https://www.sos.state.tx.us/elections/voter/county.shtml> (listing early-voting clerks).

prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." *Id.* § 82.002(a). If a "voter has a sickness or physical condition described by [§] 82.002 that originates on or after the day before the last day for submitting an application for a ballot to be voted by mail," then that voter "is eligible to vote a late ballot." TEX. ELEC. CODE § 102.001(a).

Late-ballot applications are subject to the same requirements as timely mail-in ballot applications, plus one more, *viz.*

An application for a late ballot must comply with the applicable provisions of [§] 84.002 and must include or be accompanied by a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner in substantially the following form:

"This is to certify that I know that \_\_\_\_\_ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after \_\_\_\_\_.

"Witness my hand at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
(signature of physician, chiropractor, or practitioner)"

TEX. ELEC. CODE § 102.002.

MOVE asks the Court to enjoin this provision.

## PLEA TO THE JURISDICTION

A claimant bears the burden to affirmatively demonstrate the court's subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Subject-matter jurisdiction is essential to a court's power to decide a case and can be neither presumed nor waived. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 448 n.2 (Tex. 1996). Whether a court has subject-matter jurisdiction and whether the claimant has "alleged facts that affirmatively demonstrate [such] jurisdiction" are questions of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Though factual allegations are construed in the plaintiff's favor in considering a jurisdictional plea, courts are not bound by a plaintiff's legal conclusions. *Salazar v. Morales*, 900 S.W.2d 929, 932 n.6 (Tex. App.—Austin 1995, no writ).

### I. MOVE lacks standing to sue the Secretary.

Standing is "a component of subject matter jurisdiction," *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46, and "a constitutional prerequisite to filing suit," *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). "A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cnty.*, 369 S.W.3d at 150. To have standing, MOVE must demonstrate that it has (1) an injury-in-fact that (2) is traceable to the defendant, and (3) likely to be redressed by a favorable decision. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). Standing "require[s] an actual, not merely hypothetical or generalized grievance." *Id.* at 302. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet [these] requirements." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).<sup>3</sup>

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<sup>3</sup> To the extent not contradicted by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on the subject [of justiciability] for any guidance it may yield." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Both the Texas Supreme Court and the United States Supreme Court have cautioned that courts must carefully police jurisdictional limitations such as standing because they “identif[y] those suits appropriate for judicial resolution.” *Brown*, 53 S.W.3d at 305. Often, there is a “natural urge to proceed directly to the merits of important dispute and to ‘settle’ it for the sake of convenience and efficiency.” *Hollingsworth*, 570 U.S. at 704-05. But “[i]f courts were empowered to ignore the usual limits on their jurisdiction . . . when matters of public concern are at stake, then we would no longer have a judiciary with limited power to decide genuine cases and controversies,” but a “judiciary with unbridled power to decide any question it deems important to the public.” *Morath v. Lewis*, No. 18-0555, 2020 WL 1898537, at \*3 (Tex. Apr. 17, 2020) (per curiam). Thus, the standing requirements recognize that “other branches of government may more appropriately decide abstract questions of wide public significance, particularly when judicial intervention is unnecessary to protect individual rights.” *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011) (citation and quotation marks omitted).

MOVE lacks standing to maintain this case for at least two reasons. First, MOVE cannot sue as a representative of others because it does not identify any voter who has standing to sue in their own right. Second, MOVE cannot sue independently because Texas law does not recognize organizational standing separate from the standing of an organization’s members. And even if it did, MOVE cannot show injury-in-fact, causation, and redressability with respect to the Secretary.

**a. Because it has not identified any voter with standing, MOVE lacks representational standing to sue on such voter’s behalf.**

Texas courts generally follow federal jurisprudence with respect to “representational” or “associational” standing—that is, the standing of an organization to sue on behalf of its members who are not themselves party to the suit. *See Tex. Ass’n of Bus.*, 852 S. W. 2d at 444. Under that

test, an association must—among other things—sue on behalf of members who “would otherwise have standing to sue in their own right.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977); *see also Tex. Ass’n of Bus.*, 446-47 (adopting *Hunt* associational-standing test requiring, *inter alia*, that association’s members would otherwise have standing to sue); *Tex. Soc’y of Prof’l Eng’rs v. Tex. Bd. of Architectural Exam’rs*, No. 03-08-00288-CV, 2008 WL 4682446, at \*3-4 (Tex. App.—Austin Oct. 24, 2008, no pet.) (mem. op.) (declining to find standing where plaintiff failed associational-standing test).<sup>4</sup> MOVE fails the associational standing test for at least four reasons.

1. MOVE does not allege the existence of any individual members at all, nor does it purport to be a membership organization. *See Am. Pet.* Thus, it lacks associational standing under *Hunt*.

2. Even if MOVE had alleged the existence of members, it certainly cannot “identify members who have the requisite harm” for an injury-in fact. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). MOVE relies upon statistics reflecting that Texans continue to be diagnosed with COVID-19. *See Am. Pet.* at 7. But standing cannot be established by “‘accepting the organization’s self-description of the activities of its members’ and determining that ‘there is a statistical probability that some of those members are threatened with concrete injury.’” *Funeral Consumers All., Inc. v. Serv. Corp. Int’l*, 695 F.3d 330, 343-44 (5th Cir. 2012) (quoting *Summers*, 555 U.S. at 497). Rather, the organization still must present evidence “establishing that at least one identified member had suffered or would suffer harm.” *Summers*, 555 U.S. at 498 (citations omitted); *see also Funeral Consumers All.*, 695 F.3d at 344; *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (requiring association’s members to independently meet standing requirements for organization to have associational standing).

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<sup>4</sup> The Secretary also disputes that MOVE meets any of the other requirements for associational standing and reserves the right to argue MOVE’s failure to do so as further jurisdictional grounds for dismissal.

3. MOVE cannot establish injury-in-fact because this entire case is predicated upon hypothetical injury, as opposed to the concrete and particularized harm that standing requires. *See, e.g., Andrade*, 345 S.W.3d at 15 (holding that allegations that voting software was subject to monitoring in violation of the right to secret ballot “involve only hypothetical harm, not the concrete, particularized injury standing requires.”) (citation omitted).<sup>5</sup> It assumes that some unidentified voter who would have otherwise voted in person will be diagnosed with COVID-19 between the deadline to apply for a mail-in ballot and election day. It further assumes that said voter will be unable to obtain the certification that § 102.002 requires from the doctor who diagnosed them, or any other practitioner. Because this is inherently speculative, it is insufficient to confer standing. *See, e.g., LULAC v. Hughs*, No. 20-50867, slip op at 13 (5th Cir. Oct. 12, 2020) (“We cannot conclude that speculating about postal delays for hypothetical absentee voters somehow renders Texas’s absentee ballot system constitutionally flawed.”).

4. Moreover, any injury alleged is neither traceable to nor redressable by suing the Secretary. Though Secretary Hughs is Texas’s chief election officer, this does not render her a proper party to every election-related proceeding. *See Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (holding that Secretary’s title “chief election officer” is not “a delegation of authority to care for any breakdown in the election process”). Instead, a plaintiff must show how specific actions the Secretary has taken have harmed them in order to establish standing. *See, e.g., City of*

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<sup>5</sup> A federal district court in Wisconsin reached this same result in another election-related case in *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975, at \*3 (E.D. Wis. Mar. 27, 2020). There, a local mayor claimed that he, as “an individual, may have difficulty casting an absentee ballot or voting in person.” *Id.* The court held that the Mayor lacked standing, explaining that such “allegations are too speculative to state an equal protection claim under the Fourteenth Amendment.” *Id.* The court noted that “[t]he complaint contains no allegations that the Mayor requested an absentee ballot, that he was denied an absentee ballot, or that he will be unable to mail or deliver the ballot in time for the election.” *Id.* The court concluded that, “[a]s a result, [the mayor] fails to plausibly allege the essential standing needed to proceed,” and that he could not “as an individual assert the claims of other non-parties to the action.” *Id.*

*Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (to establish jurisdiction, a plaintiff must plead that the named “official can act” to enforce the specific challenged law *and* that “there’s a significant possibility that he or she will act to harm [the] plaintiff.”)

Because local election officials—not the Secretary—administer the late-ballot framework, including § 102.002,<sup>6</sup> MOVE can establish neither causation nor redressability as to the Secretary. Moreover, to the extent that the COVID-19 outbreak has triggered any action by MOVE (or by any individual voter), the pandemic is to blame, not the Secretary. MOVE lacks associational standing.

**b. MOVE lacks independent standing to sue.**

To the extent that MOVE seeks to sue in its own right, it cannot do so, for two reasons. First, Texas courts generally do not recognize organizational standing separate from representative standing. *E.g., Perry v. Del Rio*, 66 S.W.3d 239, 249-50 (Tex. 2001) (where claims sound in State law, State law governs standing analysis). Second, even if Texas courts recognized some form of organizational standing, the Secretary should still be dismissed, because MOVE has not suffered concrete and particularized injury to any protected interest, nor can it show causation or redressability as to the Secretary.

1. Even in federal court organizational standing is limited. The U.S. Supreme Court has allowed an organization to sue for its own injuries (as opposed to those of its members) on only one occasion: In *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Court allowed an entity

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<sup>6</sup> See TEX. ELEC. CODE §§ 102.003(a) (late-ballot application must be submitted in person to early-voting clerk); .004(a) (late-ballot application “shall be reviewed and the applicant’s registration status verified by the early voting clerk in the same manner as for early voting by mail”), (b) (early-voting clerk “shall provide the balloting materials for voting an early voting ballot by mail to the representative who submits the voter’s application. Before providing the materials, the clerk shall enter the representative’s name and residence address on the application and secure the representative’s signature beside the name.”); .006(a) (“A marked late ballot must be delivered to the early voting clerk in person by the representative who submitted the voter’s application.”), (b) (“[t]he clerk shall enter the representative’s name and residence address on a returned carrier envelope and secure the representative’s signature beside the name.”).

that provided housing consulting and referral services to bring claims for damage to the organization under the Fair Housing Act. This is a controversial ruling, which has not been broadly applied even in federal courts. *See* Ryan Baasch, *Reorganizing Organizational Standing*, 103 Va. L. Rev. Online 18, 21-24 (2017). The Third Court has held that *Havens* applies only in the Fair Housing Act context, and that organizations do *not* have standing based on their “advocacy expenditure[s]” under Texas law. *Tex. Dep’t of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at \*5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App.—Austin Dec. 5, 2019). Instead, the Third Court has repeatedly equated an organization’s interests with those of its members for standing purposes. *E.g.*, *Tex. Dep’t of Ins. v. Tex. Ass’n of Health Plans*, No. 03-19-00185-CV, 2020 WL 1057769, at \*2 (Tex. App.—Austin Mar. 5, 2020, no pet. h.). Thus, without identifying a member who has standing to sue, MOVE cannot sue in its own right.

2. Even if Texas law permitted an organization to sue on its own behalf, MOVE would still lack standing to do so, because it has no protected right at issue here. Standing “require[s] that a plaintiff ‘assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’” *Andrade*, 345 S.W.3d at 15–16 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (citing *United States v. Hays*, 515 U.S. 737, 745 (1995); WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3531.10 (3d ed. 2008) (“absent a more direct individual injury, violation of the Constitution does not itself establish standing”); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.”))). As an artificial entity, MOVE does not have the right to



vote—early, late, by mail, or otherwise. MOVE lacks standing because it cannot suffer any “concrete and particularized” injury to a right that it does not enjoy. Since MOVE is necessarily alleging, at most, harm to third parties rather than to MOVE, it lacks organizational standing to sue. Instead, it alleges nothing more than “a setback to the organization’s abstract social interests,” which is insufficient to support organizational standing, even where that doctrine is recognized. *Havens*, 455 U.S. at 379.

Nevertheless, MOVE alleges that it is injured because it “has dedicated staff and funds to an emergency ballot tele-medicine program that will provide individual voters free and remote access to a physician to assist them in obtaining a doctor’s certification if the physician determines that a certification is appropriate.” Am. Pet. at 8. Voluntary expenditures untethered to any protected organizational right do not create organizational standing; instead, an organization must establish “concrete and particularized” injury to *itself*. See *Heckman*, 369 S.W.3d at 155. The Third Court has rejected the notion that an organization can meet this standard by making the “choice” to “divert volunteer and financial resources from its other work,” to counteract a provision that does not impact “any legally protected interest” of the organization. *Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at \*4 (citing *Brown*, 53 S.W.3d at 305) (“[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way”). See also, e.g., *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001) (plaintiff must be “personally aggrieved” to establish standing). As a result, any expenditures MOVE makes on its telemedicine program cannot establish organizational injury-in-fact.

Moreover, MOVE’s alleged injuries are neither caused by nor traceable to the Secretary. As noted above, the Secretary does not administer § 102.002—local early voting clerks do.

Moreover, the Secretary cannot control whether MOVE chooses to dedicate resources to an “emergency telemedicine” program, nor can she control whether any eligible voter seeks to utilize any such program. Courts are “reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413, (2013); *see also Heckman*, 369 S.W.3d at 155 (requiring causal link between injury and Defendant’s conduct). Thus, any alleged impact that § 102.002 has on MOVE is not caused by or redressable through a suit against the Secretary. *See also supra*, Part I(a)(3) (discussing speculative nature of alleged harm).

## **II. This case is nonjusticiable.**

“Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable.” *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Texas law does not afford its courts “the power to counsel a legal conclusion on a hypothetical or contingent set of facts.” *Waco ISD v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000) (citing *Patterson v. Planned Parenthood of Hous. & S.E. Tex., Inc.*, 971 S.W.2d 439, 444 (Tex. 1998)). This restriction takes two forms: a ripeness requirement and a bar against advisory opinions. This case is nonjusticiable under each of these prongs.

### **a. This case is unripe because it assumes hypothetical contingencies that have not come to pass.**

Ripeness is “‘peculiarly a question of timing.’” *Perry*, 66 S.W.3d at 250 (quoting *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 140 (1974)). A claim ripens upon the existence of “‘a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.’” *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (quoting *Bexar-Medina-Atascosa Ctys. Water Control & Improvement Dist. No. 1 v. Medina Lake Prot. Ass’n*,

640 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)). “A case is not ripe when the determination of whether a plaintiff has a concrete injury can be made only ‘on contingent or hypothetical facts, or events that have not yet come to pass.’” *In re DePinho*, 505 S.W.3d 621, 624 (Tex. 2016) (orig. proceeding) (per curiam) (alteration omitted) (collecting cases); *see also Patterson*, 971 S.W.2d at 442 (quoting 13A Charles A. Wright, et al., *Federal Practice and Procedure* § 3532 (2d ed. 1984)).

MOVE’s claim relies wholly upon a contingent chain of events. It assumes that some unidentified registered voter will be diagnosed with COVID-19 between the deadline to apply for a mail-in ballot and election day but will be unable to obtain a § 102.002 certification—not from the diagnosing physician, and not from any other practitioner. It also assumes that this hypothetical registered voter would otherwise have voted in person. It further assumes that, had the voter been able to anticipate their diagnosis before the deadline, they would have applied for a mail-in ballot. And it assumes that the voter will use MOVE’s “telemedicine program” to obtain a certification of disability, and then cast a late ballot. The Third Court has repeatedly held that the “mere possibility” that someone “might apply [a] challenged rule . . . at some point in the future is not sufficient to raise a justiciable controversy.” *VanderWerff v. Tex. Bd. of Chiropractic Examiners*, No. 03-12-00711-CV, 2014 WL 7466814, at \*2 (Tex. App.—Austin Dec. 18, 2014, no pet.) (mem. op.). This case is unripe.

**b. MOVE seeks an impermissible advisory opinion because it assumes contingencies that may never occur.**

The separation of powers enshrined in the Texas and U.S. Constitution “prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than the judicial department.” *Tex. Ass’n of Bus.*, 852 S.W.3d at 444 (citing *Fireman’s Ins. Co. of Newark v. Burch*,

442 S.W.2d 331, 333 (Tex. 1968)); *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933); *see also, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (collecting cases). Under Texas law, the hallmark of an advisory opinion is that plaintiffs “have posed a problem which is hypothetical, ‘iffy’ and contingent.” *Fireman’s Ins. Co.*, 442 S.W.2d at 334. A case is impermissibly contingent if the relevant facts are still evolving, *Waco ISD*, 22 S.W.3d at 853, but the question is less strictly about timing than about whether the court is advising what the law could be on a hypothetical set of facts. *Patterson*, 971 S.W.2d at 444; *see also Fin. Comm’n of Tex.*, 418 S.W.3d at 592 (Johnson, J., concurring in part).

MOVE challenges § 102.002 on the theory that “[i]n many instances” its late-ballot certification requirement will impose a “burden” that “will prove too heavy, the cost too high, and the quarantined voter will be disenfranchised as a result.” Am. Pet. at 2. Allegations of voter disenfranchisement are serious indeed, but they do not relieve a plaintiff of the obligation to ensure that “questions are presented in a justiciable form.” *Fireman’s Ins. Co.*, 442 S.W.2d at 333. Because this case “involves uncertain or contingent events that [will not occur] as anticipated” by MOVE’s live pleading “and may not occur at all,” it seeks an advisory opinion that is outside the Court’s jurisdiction. *Bridgeport ISD*, 447 S.W. 3d at 917; *Calif. Prod., Inc. v. Puretex Lemon Juice, Inc.*, 334 S.W.2d 780, 781 (Tex. 1960) (“The Uniform Declaratory Judgments Act does not license litigants to fish in judicial ponds for legal advice.”); *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 297 (Tex. App.—Austin 1996, no writ) (“In a declaratory judgment action, there must exist *between the parties* a justiciable controversy that will be determined by the judgment; otherwise the judgment amounts to no more than an advisory opinion, which a court does not have the power to give.”) (emphasis original).

### **III. The Secretary's immunity bars this case.**

The State of Texas, its agencies, and its officials have sovereign immunity from suit and liability unless the Legislature has expressly waived that immunity. *See, e.g., Hosner v. De Young*, 1 Tex. 764, 769 (1847); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute on other grounds as stated in Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). Sovereign immunity extends not only to suits for money damages, but also to claims that seek to “control state action” through equitable relief. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-56 (Tex. 2002); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam). Thus, to establish a trial court's subject-matter jurisdiction over claims against a state official such as the Secretary, a plaintiff must allege facts showing that immunity has been waived as to those claims. *E.g., Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004).

#### **a. The Secretary's immunity remains intact because MOVE has not pleaded a viable claim.**

In a lawsuit against the Secretary of State in their official capacity, “the Secretary retains immunity from suit unless the [plaintiffs] have pleaded a viable claim.” *Andrade*, 345 S.W.3d at 11 (citing, *inter alia*, TEX. CONST. art. I, § 3); *see also, e.g., Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13-14 (Tex. 2015) (immunity not waived and court must dismiss for lack of jurisdiction where claim is facially invalid). MOVE argues that § 102.002's certification requirement violates equal protection because it “fail[s] to provide voters with the same opportunity to self-identify their eligibility for an absentee ballot both before and after” the eleventh day before the election. Am. Pet. at 11. It further asserts that § 102.002 “violate[s] the constitutional protections of the fundamental right to vote.” Am. Pet. at 13.

Neither of these assertions states a viable claim.

**i. Section 102.002 does not violate the Equal Protection Clause.**

Despite the importance of voting, the ability to “vote in any manner and the right to associate for political purposes through the ballot,” is “not absolute.” *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Thus, equal protection jurisprudence recognizes that “States . . . have broad powers to determine the conditions under which the right of suffrage may be exercised.” *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959). As MOVE acknowledges, “[t]he legal standard for the equal-protection analysis under article I, section 3 of the Texas Constitution is the same as the legal standard for the analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” Am. Pet. at 11 (quoting *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 621 (Tex. App.—Houston [14th Dist.] 2016, no pet.)).

Under this standard, a mail-in ballot voter classification that does not “absolutely prohibit” some group from voting is subject to rational basis review. *See, e.g., McDonald v. Bd. of Elec. Comm’rs of Chi.*, 394 U.S. 802, 807-08 (1969) (distinguishing between right to vote and right to vote by mail); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403 (5th Cir. 2020) (holding that rational basis review likely applied in challenge to Election Code’s age-based mail-in ballot eligibility provision). The *McDonald* plaintiffs were incarcerated persons from the Chicago area who claimed a right to vote by mail because they could not “readily appear at the polls.” 394 U.S. at 803. Like Texas, Illinois law “made absentee balloting available to [only] four classes of persons,” including (among others) those who would be absent from their precincts or suffered from disabilities. *Id.* at 803-04. Because incarcerated persons were not among the limited classes, plaintiffs’ applications “were refused.” *Id.* at 804. Examining Illinois law under an equal-

protection framework, the Court held that so long as the inmates had another means of voting, the “Illinois statutory scheme” would not “ha[ve] an impact on [their] ability to exercise the fundamental right to vote.” *Id.* Though it might have been easier for an inmate to vote by mail, no state action “specifically disenfranchise[d]” any voter. *Id.* at 808.

The U.S. Supreme Court has also recognized that the right to vote includes a right to vote by mail only when some other state action entirely prevents a class of voters from exercising the franchise. *Goosby v. Osser*, 409 U.S. 512 (1973), held that a “Pennsylvania statutory scheme absolutely prohibits [incarcerated persons] from voting” by denying them absentee ballots, access to polling places in prisons, *or* transportation to a poll. *Id.* at 521-22. The Court found that *combination* of laws unconstitutionally disenfranchised voters. *Id.*; *see also O’Brien v. Skinner*, 414 U.S. 524, 530 (1974). There is a vast difference between “a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls” and a “statute absolutely prohibit[ing]” someone else “from exercising the franchise.” *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969).

The Fifth Circuit recently confirmed this in *Texas Democratic Party v. Abbott*, 961 F.3d at 403. Plaintiffs there argued that it was unconstitutional for Texas to allow voters aged 65 and older to vote by mail without extending that same privilege to voters under 65. *Id.* The district court enjoined the law, and on appeal, the motions panel unanimously stayed the injunction, faulting the district court for “reject[ing] Texas’s asserted interests in giving older citizens special protection and in guarding against election fraud.” *Id.* at 402. Citing *McDonald*, the panel held that rational basis review would probably apply to an absentee-ballot voter classification that does not “absolutely prohibit” some group from voting. *Id.* at 403 (citing 394 U.S. 802). It acknowledged

that COVID-19, “to be sure, increases the risks of interacting in public,” but noted that, under *McDonald*, “a state’s refusal to provide a mail-in ballot does not violate equal protection unless—again—the state has ‘in fact absolutely prohibited’ the plaintiff from voting.” *Id.* at 404.

So too here. Perhaps some would prefer to vote by mail without complying with § 102.002, but *McDonald* did not ask what a voter prefers. 394 U.S. at 808 n.6. Absent proof that other means of voting are absolutely unavailable, “the right to vote” is not “at stake.” *Id.* at 807. Texas has not “specifically disenfranchised” anyone, and its balloting rules are subject to rational-basis review.

States have substantial authority to regulate elections “to ensure fairness, honesty, and order.” *Tex. Indep. Party v. Kirk*, 84 F.3d at 182 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). *See also, e.g., Lassiter*, 360 U.S. at 50. One of the ways Texas does this is by allowing voters with disabilities to vote by mail, provided they request a ballot by the eleventh day before the election. This is a rational requirement that ensures local election officials have time to prepare and mail the ballots, and that voters have time to mark and return them before the deadline. *See* TEX. ELEC. CODE § 86.007 (marked mail-in ballot must arrive before the time the polls close on election day or be postmarked by 7 p.m. on election day). MOVE cites no authority for the proposition that voters who fail to apply for a mail-in ballot by Texas’s reasonable deadline are entitled to nevertheless vote by mail. Rather, the Fifth Circuit has explained, “mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect. The principle holds true even if ‘circumstances beyond the state’s control, such as the presence of the [coronavirus,]’ or . . . possible postal delays, make voting difficult.” *LULAC v. Hughs*, No. 20-50867, slip op at 13 (5th Cir. Oct. 12, 2020) (quoting *Tex. Democratic Party v. Abbott*, 961 F.3d at 405) (citing *McDonald*, 394 U.S. at 810 & n.8 (explaining that a State is not required to



extend absentee voting privileges to all classes of citizens, even those for whom “voting may be extremely difficult, if not practically impossible,” such as persons caring for sick relatives or businesspersons called away on business)).

This alone is sufficient to defeat MOVE’s claim on the merits. *E.g., id.* Nevertheless, Texas goes further and accommodates voters with “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health,” if that disability originates after the deadline to apply for a mail-in ballot. TEX. ELEC. CODE §§ 102.001, 82.002. Section 102.002’s certification requirement applies when such voters request a late ballot, and it carefully balances the State’s important interests in efficiently administering elections, preventing voter fraud, and instilling public confidence in the integrity of elections with the unique circumstances of voters needing to vote a late ballot on disability grounds.

Late ballots must be provided to a voter by a representative and returned to the early voting clerk by that same representative. *Id.* §§ 102.004, .006. This inherently creates opportunity for fraud, because it inserts an unaccountable private individual into a late ballot’s chain of custody. The certification requirement helps ensure that late ballots are voted by persons who intend to vote but face a recently originated disability, as opposed to fraudsters masquerading as late-ballot representatives and marking ballots on behalf of voters who did not, in fact, request them. The certification requirement also guards against evasion of the requirement that voters submitting a mail-in ballot in person provide an acceptable form of identification. *Id.* § 86.006(a-1).

The legislature clearly designed the certification requirement with voters suffering a recently originated disability in mind. The Election Code requires a late-ballot application to

include the address of any hospital, nursing home, long-term care facility, retirement center, or other location where the voter is being cared for or treated (if not their voter registration address). *Id.* § 84.002(3). This makes good sense, as someone with “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health” will likely be under the care of a professional or other caregiver. *Id.* § 82.002(a). This also facilitates access to a person able to provide the required certification. Indeed, it was reasonable for the legislature to expect that a voter afflicted with a disability originating after election day would have access to one of the professionals listed in the certification requirement—who else would diagnose the disability? And there is no requirement that a certification be obtained in person. Thus, the certification requirement was specifically designed to avoid being unduly burdensome.<sup>7</sup>

Moreover, late-ballot applications may be submitted far later than mail-in ballot applications: as late as 5 p.m. on election day. *Id.* § 102.003(b). Still, local election officials must process late ballots using the same procedures “applicable to processing early voting ballots voted by mail.” *Id.* § 102.007. The certification requirement ensures that those voting late ballots truly need to utilize this process—which, if utilized by a large number of voters, could require considerable effort by early voting clerks on election day, when clerks have significant other responsibilities as well. Thus, the State balances its legitimate election-administration interest in guarding against an influx of late ballots—perhaps cast by voters who would have been eligible to

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<sup>7</sup> This is particularly so considering that “[i]f a voter is physically unable to enter the polling place . . . on the voter’s request, an election officer shall deliver a ballot to the voter at the polling place entrance or curb.” TEX. ELEC. CODE § 64.009(a). Moreover, “[t]he regular voting procedures may be modified by the election officer to the extent necessary to conduct voting under this section,” and “[o]n the voter’s request, a person accompanying the voter shall be permitted to select the voter’s ballot and deposit the ballot in the ballot box.” *Id.* § 64.009(b), (d).

vote by mail, had they applied by the deadline—against the potential that a voter might have a disability that originates after the deadline to apply for a mail-in ballot.

All of these determinations reflect a rational choice to balance the State’s interest in providing an alternative avenue of voting for persons with recently originated disabilities against the State’s important interests in efficient election administration, guarding against election fraud, and preserving public confidence in the election process.<sup>8</sup>

**ii. Nor does § 102.002 unconstitutionally burden voting rights.**

As noted in the previous part, rules about absentee voting are subject to rational-basis review. MOVE urges, however, that the “*Anderson-Burdick*” balancing test applies to this case. Pet. at 13-15; see *Burdick v. Takushi*, 504 U.S. 428; *Anderson v. Celebrezze*, 460 U.S. 780. This is not inconsistent with applying rational basis to regulations of mail-in ballots. See, e.g., *Tex. Democratic Party v. Abbott*, 961 F.3d at 406 (Noting that “*Anderson*, for its part, does not cite (much less overrule) *McDonald*, and *Burdick* cites it favorably.”). But even if it were, § 102.002 easily satisfies *Anderson-Burdick* balancing.

Under *Anderson-Burdick*, “[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for

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<sup>8</sup> MOVE also argues that “that imposing different absentee ballot restrictions on similarly situated voters raises Equal Protection Clause concerns.” Am. Pet. at 11. But where the fundamental right to vote is at stake—as MOVE contends it is here—courts eschew the similarly situated analysis in favor of *Anderson-Burdick* balancing. And even if a “similarly situated” analysis were appropriate here, MOVE’s Equal Protection claim would still fail on the merits, because that analysis merely requires “that similarly situated individuals must be treated similarly.” *Mejia v. Sessions*, 723 F. App’x 266, 267 (5th Cir. 2018) (citing *Sonnier v. Quarterman*, 476 F.3d 349, 367 (5th Cir. 2007)). As noted above, where—as with mail-in ballots—the fundamental right to vote is not at stake, states have “wide leeway . . . to enact legislation that appears to affect similarly situated people differently.” *McDonald*, 394 U.S. at 807. And, in any event, voters who comply with the mail-in ballot application deadline and voters who do not are not similarly situated. The Election Code treats all similarly situated voters the same—those who apply for a mail-in ballot by the statutory deadline are subject to certain requirements, and those who apply for a late ballot after that deadline are subject to different requirements.

the burden imposed by its rule.” *Tex. Indep. Party v. Kirk*, 84 F.3d at 182 (citing *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789). “The rigorousness of the inquiry into the propriety of the state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights.” *Id.* (citing *Burdick*, 504 U.S. at 434). Laws that impose “severe restrictions” must be “narrowly drawn” and support “compelling” state interests, whereas “reasonable, nondiscriminatory restrictions” require only “important regulatory interests” to pass constitutional muster. *Burdick*, 504 U.S. at 434. *See also, e.g., Lee v. Va. State Bd. of Elec.*, 843 F.3d 592, 601 (4th Cir. 2016) (noting that balancing test is appropriate because “[e]very decision that a State makes in regulating an election will, inevitably, result in somewhat more inconvenience for some voters than for others[.]”).

MOVE’s claim fails under *Anderson-Burdick*. The State’s interest in election integrity far outweighs any interest MOVE claims. Indeed, the Supreme Court has stated that “[t]here is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters,” and that the need to ensure “orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). “While the most effective method of preventing election fraud may well be debatable,” the Court has said that “the propriety of doing so is perfectly clear.” *Id.* Moreover, “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 197. Commanding election officials to dispense with the established deadline to apply for a mail-in ballot on the eve of the election risks an influx of additional ballots that do not comport with the Election Code’s carefully considered late-ballot framework. Such an

outcome will neither ensure the integrity of the election nor engender public confidence in the outcome. *Cf. Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam).

Texas requires most people to vote in-person to deter fraud. The risk of voter fraud “is real,” *Crawford*, 553 U.S. at 195-96; “could affect the outcome of a close election,” *id.*; and “is a documented problem” with absentee ballots, *id.* at 225 (Souter, J., dissenting). This must be balanced against the alleged “burden [on] the plaintiff ’s rights.” *Burdick*, 504 U.S. at 434. As discussed already, MOVE itself does not have a right to vote.<sup>9</sup> And the alleged burden on voters is speculative and unsubstantiated. Indeed, the gravamen of MOVE’s claim is that, after a positive COVID-19 diagnosis, a voter may not be able to get a certification of disability. But the very fact that the voter has received a positive diagnosis indicates that a medical professional has, in fact, diagnosed the person. If the person can receive test results from their provider, it is reasonable to expect that they can obtain certification of that diagnosis from that same provider. This is no more than the “usual burdens of voting,” which the Supreme Court has recognized as constitutionally sound. *Crawford*, 553 U.S. at 198.

Indeed, every election law “invariably impose[s] some burden upon individual voters,” *Burdick*, 504 U.S. at 433, and there is no constitutional right to be free from “the usual burdens of voting.” *Crawford*, 553 U.S. at 198. Thus, when assessing an alleged burden, courts must assess its impact “categorically” upon all voters, without “consider[ing] the peculiar circumstances of individual voters.” *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment). This follows from numerous Supreme Court cases. For example, in holding that Hawaii’s ban on write-in voting “impose[d] only a limited burden on voters’ rights to make free choices and to associate politically

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<sup>9</sup> The fact that MOVE does not itself have a right to vote further emphasizes both this result and MOVE’s lack of standing to maintain this suit. *See supra*, Part I(b)(2).

through the vote,” the Court looked to the ban’s effect on Hawaii voters generally, not the plaintiff specifically. *Burdick*, 504 U.S. at 439, 436-37. In rejecting the New Party’s challenge to Minnesota’s ban on fusion candidates, the Court examined the ban’s effect on “minor political parties” generally, not on the New Party in particular. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361-62 (1997). And in rejecting a voter challenge to Oklahoma’s semi-closed primary system, the Court emphasized that such “primary system does not severely burden the associational rights of the state’s citizenry” generally—irrespective of its effect on the individual plaintiffs. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). This line of cases “refute[s] the view that individual impacts are relevant to determining the severity of the burden” that “a generally applicable, nondiscriminatory voting regulation” imposes. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).

That precedent requires assessing burdens categorically should be no surprise; the Equal Protection Clause itself compels this approach, and “weighing the burden of a nondiscriminatory law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.” *Id.* at 207. “A voter complaining about such a law’s effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.” *Id.* (citing *Washington v. Davis*, 426 U.S. at 248). In short, the “Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens fall disproportionately on a protected class.*” *Id.*

There is no evidence that Texas’s certification requirement is motivated by “discriminatory intent.” And, for the reasons set forth in the previous part, this requirement is

tailored to balance the interests of voters suffering from a recently originating disability against the State’s important interests. Indeed, all Texas mail-in voters “have the same right as any voter to read the instructions in front of them and to follow them to ensure their intended vote is recorded.” *Tex. Democratic Party v. Williams*, No. 1:07-cv-115-SS, 2007 WL 9710211, at \*5 (W.D. Tex. Aug. 16, 2007), *aff’d*, 285 F. App’x 194 (5th Cir. 2008). Any idiosyncratic effects this might have on particular voters thus “are not severe,” *Crawford*, 553 U.S. at 205, and are amply justified by the State’s important interests.

**b. This case is further barred because constitutional challenges to statutes cannot be maintained against state officials in their official capacities.**

An *ultra vires* claim against a state official in his or her official capacity is an improper mechanism to challenge the constitutionality of a statute. *Patel v. Tex. Dep’t of Licensing & Reg.*, 469 S.W.3d 69, 76–77 (Tex. 2015) (“[B]ecause the [plaintiffs] challenge the validity of the [] statutes and regulations . . . the *ultra vires* exception does not apply.”). In *Patel*, “[t]he State propose[d] that an official can act *ultra vires* either by acting inconsistently with a constitutional statute or by acting consistently with an unconstitutional one,” but the Texas Supreme Court rejected that proposition as “an illogical extension of [the] underlying premise” of an *ultra vires* action. 469 S.W.3d at 76. Per *Patel*, to challenge the constitutionality of a statute, the challenger must sue the relevant state entity—*not* an official capacity defendant and *not* through an *ultra vires* claim. *Id.*; *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Gant v. Abbott*, 574 S.W.3d 625, 633–34 (Tex. App.—Austin 2019, no pet.) (holding that sovereign immunity barred plaintiffs’ constitutional challenge to a state law because they sued the state officials in their official capacities, rather than the relevant governmental entity).

**c. MOVE’s statutory construction argument also fails on the merits.**

Finally, MOVE’s statutory construction argument would fail even if MOVE had standing to assert it. Numerous Texas courts have already held that § 102.002 is mandatory, meaning that late ballots that are unaccompanied by the required certification may not be counted. *See, e.g., Kelley v. Scott*, 733 S.W.2d 312, 313–14 (Tex. App.—El Paso 1987, no writ); *Reese v. Duncan*, 80 S.W.3d 650, 658 (Tex. App.—Dallas 2002, no pet.) (noting if the legislature intended a statute “simply to promote prompt, orderly, and proper business conduct . . . and not to prevent fraud or abuse, then it would not have included language that a violation of the statute results in a ballot not being counted,” and that § 102.002 is a mandatory provision.). The rules of statutory construction do not permit courts to depart from the plain text of the statute where its meaning is clear. *See, e.g., TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 75 (Tex. 2016) (“Applying well-established statutory-construction principles, we discern no ambiguity in the relevant statutory provisions . . . we therefore construe it according to its plain language as informed by the statutory context without resorting to canons of construction and extrinsic aids.”)

MOVE’s statutory construction argument does not save this case.



## RESPONSE IN OPPOSITION TO APPLICATION FOR TEMPORARY INJUNCTION

Even if the Court had jurisdiction, MOVE would not be entitled to a temporary injunction. The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). To obtain a temporary injunction, the applicant must plead *and prove* three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.*; *see also Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968). The party seeking the injunction bears the burden of proving all three elements. *Cold Spring Granite Co. v. Karrasch*, 96 S.W.3d 514, 516-17 (Tex. App.—Austin 2002, no pet.). Injunctive relief is inappropriate if any of the three elements is absent. *Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc.*, 266 S.W.3d 25, 30 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

An injunction should not issue unless the plaintiff demonstrates a probable right to recovery; accordingly, a trial court abuses its discretion “when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery.” *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). In determining whether to issue a temporary injunction, the court also conducts “a balancing of the ‘equities’ and hardships, including a consideration of the

important factor of the public interest.” *Methodist Hosps. of Dallas v. Tex. Indus. Accident Bd.*, 798 S.W.2d 651, 660 (Tex. App.—Austin 1990, writ dismissed w.o.j.).

**I. MOVE has not shown a probable right to relief.**

For the reasons set forth in the Plea to the Jurisdiction, *supra*, which is incorporated by reference, MOVE has not shown a probable right to relief.

**II. MOVE has not shown that it will suffer irreparable harm absent the requested injunction.**

MOVE asserts that, if the Court does not enjoin § 102.002, “MOVE will suffer irreparable harm from having to allocate its scarce resources to assist voters in securing doctors’ certifications in order to secure late absentee ballots.” Am. Pet. at 16. This does not carry their burden to show irreparable harm, because MOVE has not shown that it has any constitutional right at issue here—and certainly cannot establish that it will suffer harm—for the reasons outlined in the Plea to the Jurisdiction above.

**III. The balance of equities favors denying the requested injunction.**

When balancing the equities for purposes of determining whether an injunction should issue, “[i]f the Court finds that the injury to the complainant is slight in comparison to the injury caused the defendant and the public by enjoining the nuisance, relief will ordinarily be refused.” *Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 618-19 (Tex. 1950). Where the movant seeks to enjoin government action, “there must be a showing that granting the injunction would serve the public interest.” *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485 (Tex. App.—Houston [1st

Dist.] 1983, writ dism'd), *overruled in part on other grounds*, *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000).

MOVE does not directly address the equitable balancing at issue in a request for a temporary injunction, instead offering the bald assertion that “[t]here are no costs associated with waiving [§102.002]” and that “[t]here is no apparent state interest in requiring this certification [because] similar certification is not required for any other voter who votes absentee.” Am. Pet. at 17. This ignores the State’s weighty and indisputable interests in efficiently administering elections, preventing voter fraud, and preserving public confidence in the integrity of elections, as set forth in the Plea to the Jurisdiction above.

In addition to recognizing these important election-related interests, the Supreme Court has also stated that the “inability [for a State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). No interest MOVE asserts outweighs Texas’s interests in administering elections and applying duly enacted laws. *See, e.g., Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, when a duly enacted law cannot be enforced, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws”).

Finally, as the Texas Supreme Court has recognized, “[t]he United States Supreme Court ha[ve] repeatedly warned against judicial interference in an election that is imminent or ongoing. ‘Court changes of election laws close in time to the election are strongly disfavored.’” *In re Steven Hotze, M.D., et al.*, No. 20-0739, 2020 WL 5919726, at \*3 (Tex. Oct. 7, 2020) (citing *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting Supreme

Court’s repeated emphasis that “lower federal courts should ordinarily not alter the election rules on the eve of an election.”); *N. Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying lower court order that changed election laws sixty days before election); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying application to vacate Court of Appeals’ stay of district court injunction that changed election laws on eve of election); *Purcell v. Gonzalez*, 549 U.S. 1 (staying a lower court order changing election laws twenty-nine days before election); *Andino v. Middleton*, No. 20A55, slip op. at 2, (Oct. 5, 2020) (Kavanaugh, J., concurring); *Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, slip op. at 3–4 (5th Cir. Sept. 30, 2020).

Because MOVE has not made the required showing to obtain the extraordinary relief it requests, its motion should be denied. Moreover, as of this filing, early voting in Texas has begun. The fact that the election is, for all practical purposes, now underway further emphasizes this result.

## CONCLUSION

For the foregoing reasons, the Court should deny MOVE's request for a temporary injunction and dismiss the Secretary from this case for lack of jurisdiction.

Respectfully submitted,

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HER OFFICIAL CAPACITY AS TEXAS SECRETARY  
OF STATE**

**CERTIFICATE OF SERVICE**

I certify that that on October 13, 2020, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/*Anne Marie Mackin*

ANNE MARIE MACKIN

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**CAUSE NO. D-1-GN-20-005507**

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
DANA DEBEAUVOIR, in her official capacity	§	
as Travis County Clerk, and RUTH HUGHS,	§	
in her official capacity as Texas Secretary	§	
of State	§	
<i>Defendants.</i>	§	419TH JUDICIAL DISTRICT

**ORDER GRANTING DEFENDANT SECRETARY OF STATE'S PLEA TO THE JURISDICTION**

On this day the Court considered the plea to the jurisdiction filed by Defendant, Texas Secretary of State in her official capacity. Upon due consideration of the plea, any argument of counsel, and any evidence before the Court, the Court is of the opinion that said plea is meritorious and should be granted.

It is therefore ORDERED that the Secretary of State is dismissed as a defendant herein for lack of jurisdiction.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2020.

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HONORABLE DISTRICT JUDGE PRESIDING



# App. 4

**NO. D-1-GN-20-005507**

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
v.	§	
	§	
	§	OF TRAVIS COUNTY, TEXAS
DANA DeBEAUVOIR, in her official	§	
capacity as Travis County Clerk, and	§	
RUTH HUGHS, in her official capacity	§	
as Texas Secretary of State,	§	
<i>Defendants.</i>	§	419th JUDICIAL DISTRICT

**PLAINTIFF'S RESPONSE TO PLEA TO THE JURISDICTION**  
**AND BRIEF IN SUPPORT OF TEMPORARY INJUNCTION**

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## SCOPE OF THIS BRIEF AND THE OCTOBER 16 HEARING

Plaintiff MOVE Texas Action Fund (“MOVE”) is a non-profit corporation that works to register underrepresented youth communities to vote and performs significant outreach to turn newly registered voters into life-long voters and to provide those voters with resources and information to make voting accessible for them. MOVE filed this suit seeking relief from a provision of the Texas Election Code that stands as an impediment to any voter who develops a disability after the Oct. 23 deadline to apply for an absentee ballot for the Nov. 3 election, including any voter diagnosed positive with COVID-19 after the vote-by-mail deadline. Specifically, MOVE asks this Court to enjoin the requirement of a doctor’s certification in § 102.002 of the Texas Election Code, in part to ensure that that any voter who has been diagnosed with COVID-19 after the deadline and applies to obtain a late absentee ballot is not disenfranchised. Tex. Elec. Code § 102.002.

MOVE has pled constitutional and statutory claims seeking relief from the doctor’s certification, and its application for a temporary injunction is set for hearing before the Court. Defendant Texas Secretary of State (“SOS”) filed a combined response to the application and a plea to the jurisdiction. Through this omnibus pleading, MOVE will both respond to the plea to the jurisdiction and brief its entitlement to a temporary injunction.

There is significant overlap in the factual record and legal argument pertaining to the plea to the jurisdiction and the elements of a temporary injunction in this case. For example, the facts supporting MOVE’s standing to bring its claims (which is at issue in the SOS’s plea to the jurisdiction) overlap with the facts demonstrating irreparable harm (an element of the temporary injunction). In order to ensure that there is a complete record as

to all issues, MOVE suggests that at the hearing the Court first hear brief opening remarks followed by all of the evidence, whether by live testimony, declaration, or documentary exhibit. Then, the parties can present argument on both the jurisdictional challenge and the application for temporary injunction. Given the short time remaining before the election and the likelihood that there will be some measure of appellate review of any orders rendered in this proceeding, it makes the most sense to secure a complete record and a court decision as to all issues.

Ultimately, the injunctive relief MOVE seeks is modest: for the upcoming election, enjoin the doctor's certification requirement in § 102.002. Let voters who receive a COVID-19 diagnosis on or after October 23 apply for an absentee ballot the same way as voters who receive a COVID-19 diagnosis on October 21—through an application self-certifying that they have a qualifying disability.

### FACTUAL AND STATUTORY BACKGROUND

#### A. Statutory provisions regarding late absentee ballots

Under the Texas Election Code, a Texan registered to vote can request an absentee ballot through an application certifying that they meet one of the statutory criteria for voting absentee. *See* Tex. Elec. Code §§ 82.001-.004. Relevant to this action, one of the statutory criteria for securing an absentee ballot is *disability*, which the statute defines as “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.” *Id.* § 82.002(a).

A voter can self-certify that they meet one of the statutory criteria so long as they submit their completed application for an absentee ballot by the eleventh day before the election. *Id.* § 84.007(c). The voter does not need to do more than check a box on the application; neither an explanation nor any third-party verification is required or even permitted. *In re State*, 602 S.W.3d 549, 561 (Tex. 2020) (“Indeed, the Legislature rejected the requirement of a physician’s proof of disability for mail-in voting applications [submitted before the deadline] when it amended the Election Code in 1981. And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason for seeking a ballot by mail is a disability. Local election officials “do not have a ministerial duty, reviewable by mandamus, to look beyond the application to vote by mail.”).

If a voter gets COVID-19 *after* the deadline has passed to apply for an absentee ballot, a different, more burdensome procedure applies. *See* Tex. Elec. Code § 102.001, *et seq.* A voter under those circumstances can apply for a so-called “late ballot,” but rather than simply self-certifying that they meet the statutory standard for a disability, the voter must have a doctor’s certification establishing that the voter has a qualifying sickness that originated on or after the day before the deadline for applying for an absentee ballot that prevents them from voting in person.

The doctor’s certification requirement includes this mandatory statutory language:

An application for a late ballot must comply with the applicable provisions of Section 84.002 and must include or be accompanied by a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner in substantially the following form:

“This is to certify that I know that \_\_\_\_\_ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after \_\_\_\_\_.

“Witness my hand at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
(signature of physician, chiropractor, or practitioner)”

Tex. Elec. Code § 102.002.

The Supreme Court of Texas has held that the lack of immunity to COVID-19 is not, by itself, a sufficient disability to satisfy the statutory criteria for voting absentee. *In re State*, 602 S.W.3d at 560. But an actual diagnosis of COVID-19 satisfies the statutory standard for a *disability* sufficient to authorize the sick voter to check the disability box and receive an absentee ballot. PX 3 (McCorkle Declaration)

The Texas Attorney General (“AG”) and the SOS have emphasized that an actual, positive diagnosis of COVID-19 is a “sickness or physical condition” that would satisfy the statutory definition of disability. For example, the AG issued a Mail-In Ballot Guidance Letter on May 1, 2020, addressed to all Texas County Judges and County Election Officials. PX 7 (AG Guidance Letter). The AG Guidance Letter states that fear of contracting COVID-19 is not sufficient to satisfy the statutory definition of disability because that fear is not a “sickness.” But “a person ill with COVID-19 would certainly qualify as having a sickness.” *Id.* p.2; *see also* PX 13 (SOS Election Advisory No. 2020-14) (advisory addressing COVID-related issues includes guidance regarding “Expanding



Eligibility Requirements Under Chapter 102 (Late Voting for Sickness or Physical Disability)”).

- B. Travis County voters have faced the difficulty of obtaining a physician certification following a late COVID-19 diagnosis.

Through this suit, MOVE seeks to prevent registered, eligible voters from being disenfranchised because they are diagnosed with COVID-19 after the regular deadline to request an absentee ballot. This factual scenario is not far-fetched or hypothetical. It happened in Travis County during the July 2020 primary runoff election. PX 2 (Harrison Declaration). The Harrison Declaration describes the circumstances of two Travis County registered voters who received positive COVID-19 diagnoses after the cutoff for self-certification of a disability to receive an absentee ballot. They sought an order allowing them to self-certify as having a qualifying disability and thereby secure an absentee ballot, but the court denied relief. Ultimately, one of the voters was able to get a doctor’s certification and vote, but the other was not and was disenfranchised. *Id.*

The Harrison Declaration does more than demonstrate that late diagnoses of COVID-19 actually happen, they implicate late ballot procedures, and they disenfranchise voters. It also debunks two incorrect factual arguments the SOS makes to this Court, which a fundamental failure to grapple with the reality of COVID-19 testing and diagnoses.

First, both of the voters discussed in the Harrison Declaration received their positive COVID-19 diagnoses days after actually taking the test. PX 2. This is typical for COVID-19 diagnoses, including testing through public health authorities that are available free of charge for those who cannot afford private testing options. PX 3 (McCorkle Declaration)

PX 14 (City of Austin Advisory). Indeed, most COVID-19 testing is performed without the patient seeing a licensed physician at all. PX 3(McCorkle Declaration). The actual evidence belies SOS's glib assurance that the doctor's certification is not a burden because the person receiving a positive COVID-19 diagnosis could simply ask for a certification while they are in the doctor's office for the test. SOS PTJ p.22 ("If the person can receive test results from their provider, it is reasonable to expect that they can obtain certification of that diagnosis from that same provider."). In fact, voters receiving a positive COVID-19 diagnosis would need a separate post-diagnosis visit to a doctor in order to get the certification for a late ballot. Moreover, voters without established physician relationships, or whose doctors do not have appointments available on short notice, or who cannot afford a doctor visit, or who are too ill to travel to see a doctor to get a certification, will not be able to secure such visits. The burden is real.

Second, the Harrison Declaration demonstrates that the burden to obtain a doctor's certification following a late COVID-19 diagnosis can actually disenfranchise an eligible voter notwithstanding the voter's best efforts. PX 2. The two voters are husband and wife. One had an existing relationship with a primary care physician and was able to get the requisite certification and vote. The other did not have an existing physician relationship and was not able to vote. Both strove to exercise their right to vote, but only the individual with an existing physician relationship was able to secure the necessary certification and vote. This real-life example demonstrates that the doctor's certification requirement operates in practice on a seriously-unequal basis.

As of the time this suit was filed, 96 new cases of COVID-19 are confirmed in Travis County every day. If that average holds, more than 1,000 people will be confirmed with COVID-19 between the deadline to apply for an absentee ballot (October 23) and Election Day in Travis County alone; the numbers are much greater state-wide. All of those voters would qualify for an absentee ballot due to that disability, but because of the unforeseen circumstance of *when* they contracted a contagious virus, they are subject to the additional burden of a doctor's certification. The Harrison Declaration demonstrates that in many instances that burden will prove too heavy, the cost too high, and the quarantined voter will be disenfranchised as a result.

These burdens will disproportionately impact communities of color. Both in the number of COVID-19 cases and the incidence of fatalities, communities of color are impacted at rates higher than their percentage of the population. PX 10-12.<sup>1</sup> Adding the burden to secure a doctor's certification in order to exercise the fundamental right to vote simply amplifies that discriminatory burden.

C. MOVE has diverted resources from other programs to set up a telemedicine program to assist voters who receive late COVID-19 diagnoses.

Attached as Exhibit 1 to Plaintiffs First Amended Petition is MOVE's Project Plan for its Texas Emergency Ballot Telemedicine Program. PX 1. The severe burden imposed on Texas voters by the doctor's certification requirements in Texas Election Code §

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<sup>1</sup> The disparate impact on communities of color has been the subject of current press analysis as well. See PX 19; "Across Texas and the nation, the novel coronavirus is deadlier for people of color," Texas Tribune, July 30, 2020, available at: <https://www.texastribune.org/2020/07/30/texas-coronavirus-deaths/>.

102.002, coupled with the vast increase in the need for voters to be able to utilize late ballot procedure due to present pandemic circumstances, has prompted MOVE to develop and implement a plan to engage personally with and assist voters in complying with the statute's onerous requirements for securing a late ballot. These voters are primarily young, low-income, and uninsured voters of color who likely cannot afford to satisfy the certification requirements by seeing a physician, but also any voter who cannot secure a physician visit on short notice, including voters with any kind of disability that would qualify them to vote pursuant to Texas Election Code §§ 82.002, 84.002, and 102.001.

MOVE's program is simple: in order to alleviate as much as possible the burdens on voters who need a late ballot and who may be otherwise disenfranchised, MOVE will provide access to volunteer physicians via a telemedicine-style platform for voters who have had a qualifying disability diagnosed after the mail-in ballot deadline. Accordingly, this program is currently scheduled to run from October 23, 2020 to November 3, 2020 for the 2020 General Election.

To build out this project, MOVE has spent hundreds of hours of staff and board time, has: (1) purchased a toll-free phone number and phone system for voters in need of assistance; (2) contracted with "DocuSign" to provide online signature verification services directly to volunteer physicians; (3) contracted with Zoom to provide meeting and breakout rooms for voters and volunteer physicians; (4) built a network of volunteer physicians; (5) consulted legal counsel and a human resource professional to ensure compliance with HIPAA requirements for the program; (6) added a dedicated webpage to MOVE's website to recruit physicians; and (7) planned and prepared a marketing and outreach campaign to

inform voters of their options to vote by emergency/late ballot if they qualify and are unable to vote in person due to quarantine or another disability.

MOVE's board of directors has approved a budget for the project of \$21,370 for November 2020 General Election and will reallocate funds for future elections as necessary. Much of this budget has already been spent to have the project ready to roll out on the mail-in ballot deadline. To avoid confusion about eligibility, MOVE has determined that its media and publicity campaigns will not start until voters are no longer eligible request a regular mail-in ballot. These funds and staff time are being directly diverted from MOVE's other mission priorities including additional paid text messages, paid canvasser phone calls, and social media advertising related to MOVE's get-out-the-vote efforts during early voting; election education and election protection work, and other activities that demand staff, board, and Executive Director's time during the workday.

### ARGUMENT

"To obtain a temporary injunction, the applicant must ordinarily plead and prove three specific elements: (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim." *Texas Health & Human Services Com'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 629 (Tex. App.—Austin 2013, no pet.). MOVE has met these standards. Additionally, SOS's Plea to the Jurisdiction fails because MOVE has organizational standing to bring its claims, the claims are ripe, and governmental immunity does not bar their requested relief.

A. MOVE has pled a valid cause of action against Defendants.

MOVE seeks declaratory relief pursuant to the Uniform Declaratory Judgments Act (“UDJA”), Tex. Civ. Prac. & Rem. Code Section 37.004(a): “[a] person whose rights, status, or other legal relationships are affected by a statute . . . can seek a declaratory judgment to determine any question of construction or validity arising under the statute . . . and obtain a declaration of rights, status, or other legal relationships.” MOVE further seeks permanent and temporary injunctive relief under Tex. Civ. Prac. & Rem. Code Section 65.011 (“A writ of injunction may be granted if the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant”), and Tex. Elec. Code Section 273.081 (“A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.”).

B. MOVE has demonstrated a probable right to relief.

“To establish a probable right to recovery, an applicant need not prove that she will ultimately prevail in the litigation; rather, the applicant must show she has a cause of action for which relief may be granted.” *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at \*2-3 (Tex. App.—Austin Aug. 11, 2005, no pet.) (citing *Universal Health Servs. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.)). MOVE satisfies this standard because it has standing to seek the requested relief and demonstrates a probable right to recover on such relief.

1. MOVE has standing to asserts its claims.

“The general test for standing in Texas requires that there (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.” *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). MOVE seeks injunctive relief and a declaratory judgment under the UDJA. Where, as here, MOVE has demonstrated “‘a particularized, legally protected interest that is actually or imminently affected by the alleged harm,’” it has established standing under the UDJA. *Texas Dep’t of Pub. Safety v. Salazar*, 304 S.W.3d 896, 906 (Tex. App.—Austin 2009, no pet.) (internal citation omitted).

A membership organization “has standing to sue on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Texas Ass’n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v. Wa. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). Further, organizations also have standing where they have suffered direct injury. *See, e.g., City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 549 (Tex. App.—San Antonio 2012, pet. denied) (finding organization had standing where it had suffered direct injury).

MOVE has standing because it will suffer direct injury. Specifically, MOVE has been forced to divert resources to the telemedicine program to counteract the disenfranchisement that could occur because of the doctor’s certification requirement. Those resources have, in turn, taken away from MOVE’s other voter education and support

activities and will prevent MOVE from carrying out its educational mission. This diversion frustrates the organization's ability to fully discharge its mission at a critical time running up to a general election. This sort of diversion of scarce resources is a direct injury that supports organizational standing specifically in the context of voting rights challenges. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (finding organizational standing where voting rights organization diverted resources to counteract State's alleged unlawful voter-interpreter restriction).

The State's assertion that MOVE is merely engaged in "advocacy" is misplaced. In *Texas Department of Family and Protective Services v. Grassroots Leadership*, No. 03-18-00261-CV, 2018 WL 6187433, at \*5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), an entity's expenditure of resources was in advocacy to oppose a particular rule, which the Court found too attenuated. Here, the organization (MOVE) is not claiming standing on the basis of resources expended to combat the doctor's certification requirement. Instead, MOVE is incurring substantial costs to provide voters with telemedicine support program that enables them to secure the necessary certification for a late ballot *lest those voters be disenfranchised*. Preventing such disenfranchisement is germane to MOVE's mission; implementing a telemedicine program, while necessary in furtherance of this mission, is not part of MOVE's routine activities. There can be no question that such a cost constitutes injury in fact, just as a corporation might have standing to challenge government or third-party action that force it to incur remediation or other expenses.

Further, SOS's efforts to cast *Grassroots Leadership* as limiting organizational standing to cases under the Fair Housing Act is incorrect. PTJ at 9. Numerous courts



recognize organizational standing, including in the voting rights context. *See, e.g., Ass’n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (applying *Havens* diversion-of-resources analysis to voting rights organization, but finding standard not met); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding that the NAACP had standing to challenge voter ID law “[b]ecause it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards”); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 954 (7th Cir. 2019) (finding that voting rights organization had standing under *Havens* diversion of resources analysis). Fundamentally, the inquiry is whether an organization or individual has suffered “injury in fact,” and that is a question that encompasses far more than housing-act violations.

2. MOVE has a probable right to the relief based on the merits of its Equal Protection claim.

MOVE has properly pled and is likely to succeed on its claims that § 102.002 of the Texas Election Code is unconstitutional on its face because it violates Equal Protection guaranteed by the Texas Constitution. The statute is facially unconstitutional because it fails to meet two separate tests for constitutionality outlined by the United States Supreme Court, each of which is prerequisite and not mutually exclusive of the other. *See generally* Tex. Const. Art. I, § 3; *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 621 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002) (“The legal standard for the equal-protection analysis under article I, section 3 of the Texas Constitution is the same as the legal standard for the analysis

under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”)).

a. Applicable legal standards

MOVE’s first Equal Protection claim alleges that the disparate treatment of similarly situated voters, and the burden on the fundamental right to vote resulting therefrom, renders § 102.002 unconstitutional. The disparate treatment of similarly situated voters categorically implicates Equal Protection and must pass judicial scrutiny in accordance with the severity of the burden imposed on voters. While there is no constitutionally guaranteed right to vote in a certain manner, similarly situated voters cannot be treated differently regarding their access to state-created voting procedures. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974) (holding unconstitutional a scheme that arbitrarily denied mail-in ballots to certain classes of voters who were unable to vote in person while affording that opportunity to others). “If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. On the other extreme, when a state’s classification ‘severely’ burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard.” *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (internal citations omitted); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the

Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

As described below, while the burden on voters qualifying for a late ballot under § 102.002 is “severe” so as to require strict scrutiny under a traditional Equal Protection analysis, the SOS offers no justification for the doctor’s certification requirement that passes even a rational basis review.

Second, an Equal Protection challenge of any burden placed on voters by state election procedures—regardless of whether that procedure treats all voters similarly—are evaluated under the standard laid out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190-191 (2008); see also *Stringer v. Pablos*, 2020 WL 532937, at \*7 (W.D. Tex. Jan. 30, 2020) (collecting cases). The *Anderson-Burdick* standard is a balancing test:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The *Anderson-Burdick* standard is flexible, and there is no “litmus test for measuring the severity of a burden.” *Crawford*, 553 U.S. at 191. Instead, any burden whatsoever must be justified by “relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Id.* (cleaned up). In *Crawford*, the Supreme Court “reaffirmed *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to

the right to vote against the ‘precise interests put forward by the [s]tate as justification for the burden imposed by its rule.’” 533 U.S. at 190-191 (quoting *Anderson*, 460 U.S. at 789). Likewise, in *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009), the Fifth Circuit noted that *Anderson* and *Burdick* “balance the individual’s rights against state-imposed requirements.” *Id.* at 168 n.6; *see also Wilson v. Birnberg*, 667 F.3d 591, 598 (5th Cir. 2012). And, even more recently, the Sixth Circuit explained that the *Anderson-Burdick* standard is “sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote.” *Obama for Am.*, 697 F.3d at 429 (additionally noting that courts have applied traditional Equal Protection scrutiny where the burden is “severe” or when there is no burden on the right to vote, and applied *Anderson-Burdick* in the area between). These two claims, together, provide that § 102.002 violates Equal Protection if it:

- imposes a severe burden on the right to vote and fails strict scrutiny;
- regardless of any burden imposed on the right to vote, fails rational basis review; or,
- the burden on the right to vote is not justified by “relevant and legitimate state interests” of “sufficient weight.”

And while the SOS contends that current absentee ballot rules “treat[] all similarly situated voters the same—those who apply for a mail-in ballot by the statutory deadline are subject to certain requirements, and those who apply for a late ballot after that deadline are subject to different requirements,” SOS PTJ at 20 n.8, the Court should reject this interpretation because the disabled voters are similarly situated in every way that is circumstantial to them or within their control, only differentiated by the Election Code’s

arbitrary eleven-day deadline. The SOS’s interpretation would permit any arbitrary distinction made by the State to evade Equal Protection review, and this is not the law. *See O’Brien v. Skinner*, 414 U.S. 524, 530 (1974).

b. Section 102.002 imposes a severe burden on voters.

The first step in the constitutional analysis is assessing the burden placed on voters by § 102.002. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Consistent with this axiom, courts have consistently held that the disenfranchisement of voters places a severe burden on the right to vote. *See, e.g., Ne. Ohio Coal. For the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012)); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (stating that it is a “basic truth that even one disenfranchised voter—let alone several thousand—is too many”).

As an initial matter, the SOS misplaces her reliance on *LULAC v. Hughs*, No. 20-50867 (5th Cir. Oct. 12, 2020) and *McDonald*, 394 U.S. at 810 & n.8 for the proposition that “mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect . . . even if ‘circumstances beyond the state’s control, such as the presence of the [coronavirus,]’ or . . . possible postal delays, make voting difficult.” SOS PTJ at 17. This comment recognizes the general rule the states are not required to provide certain voting procedures at all, but it does not address the fact that if a state chooses to provide a specific procedure, that procedure must be available equally to

similarly situated voters, and must not impose unnecessary burdens on voters who chose to exercise it.

As described above, requiring a doctor's certification for a late ballot severely burdens voters who have no choice but to use the late ballot procedure or be disenfranchised entirely. First, to comply with this rule, a voter must have access to a physician, be able to schedule an appointment or achieve contact in some other way on necessarily short notice, pay fees and/or insurance deductibles and co-payments (unless they get access to a free program like MOVE's telemedicine program), and often travel to an appointment when the inability to travel is precisely the reason that the voter needs to vote absentee. Second, these burdens result in the actual disenfranchisement of voters who cannot comply with the onerous requirements, and they discriminate against voters who are low-income, uninsured, rural, and otherwise without regular access to medical care. And importantly, none of these burdens are imposed on voters with the exact same qualifications for voting absentee who are permitted to self-certify their eligibility pursuant to Texas Election Code § 84.002 and vote a regular mail-in ballot. *See In re State*, 602 S.W.3d 549, 550 (Tex. 2020) (orig. proc.) ("The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability.'").

- c. The SOS fails to provide sufficient justification for the burden that § 102.002 imposes on voters.

The next step in the constitutional analysis requires weighing the burden placed on voters against the "precise interests" offered by election officials as justification. *Burdick*,

504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). “However slight that burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford*, 553 U.S. at 191. The burden caused by the § 102.002 doctor’s certification procedure is far from “slight”—especially in a pandemic—but the SOS offers no legitimate interest of any weight to justify imposing the onerous doctor’s certification requirement. The critical test is whether the burdens are justified by interests of sufficient “legitimacy and strength,” with consideration given to “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789 (collecting cases).

Importantly, the SOS must provide not only justification for the burden imposed by § 102.002 on anyone who uses the procedure, but also must provide sufficient justification for the disparate treatment of similarly situated voters. In other words, SOS must offer sufficient justification for imposing this burden on late ballot voters, generally, but also in light of the fact that it does not impose these requirements on identically situated voters who apply for a regular mail-in ballot just days earlier. Tex. Elec. Code § 102.002 (requiring that a voter must qualify under the disability provision of Tex. Elec. Code § 84.002 in addition to its other requirements); *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974) (overturning mail ballot law for its “arbitrary” distinction among voters required to vote absentee for various different reasons).

The SOS raises several purported justifications for the doctor’s certification requirement for late ballots, each of which fails even rational basis scrutiny, let alone the *Anderson-Burdick* requirement that these interests must be sufficiently weighty that they

are “necessary” compared to the burden imposed on voters. SOS alleges that the state interests in requiring a doctor’s certification only of late mail ballot applicants are: “efficiently administering elections, preventing voter fraud, and instilling public confidence in the integrity of elections.” SOS PTJ at 18. Those may be legitimate state interests generally, but *Anderson-Burdick* requires more—specifically, that the burden imposed on voters actually furthers the stated interest. *Crawford*, 553 U.S. at 191. The requirement that some disabled absentee voters must provide a doctor’s certification while others do not does not further any of the State’s stated interests.

First, the SOS contends that its fraud interest is furthered because the late ballot procedure involves a third party who delivers the late ballot to the voter and returns it. This procedure, however, has nothing to do with requirement of a doctor’s certification, and a doctor’s certification does nothing to mitigate any fraud risk inserted into the process by the involvement of this voter representative. The SOS next argues that the doctor’s certification somehow equates to the requirement that ID is required to return a mail-in ballot in person. But the late ballot process does not involve an ID requirement, and there is no rational basis for connecting the doctor’s certification to any type of ID verification. Indeed, it is not clear that a physician would have to check any ID to issue a certification, and the Election Code does not allow a doctor’s signature to substitute for ID in any other circumstances. Furthermore, this is nonsensical compared to regular mail-in ballot voters, who are not required to provide any ID at all to return a mail-in ballot.

Neither does § 102.002 further “the orderly and efficient administration of elections.” This claim simply says that elections officials are busy close to an election, so



the State is justified in providing a late ballot option that is difficult to use to save the election administrators resources. Not only is this irrational, but it also has no basis in reality when late ballot applicants are compared to regular mail-ballot voters, who already turn in mail-in ballots during the same time period, and can do so in person at statutorily mandated elections offices. And, even if this were a rational interest, the fact that elections administrators may be required to help voters cast a ballot is no weight against the burdens imposed by the doctor's certification requirement.

Finally, the SOS's contention that the doctor's certification furthers "public confidence in the integrity of the electoral process . . . because it encourages citizen participation in the democratic process," SOS PTJ at 21, is removed from reality because its application literally prevents participation. Far from advancing public confidence, the doctor's certification requirement undercuts public confidence in the integrity of the electoral process by excluding some voters while permitting identically situated voters to participate.

3. MOVE has a probable right to relief on the merits of its statutory waiver claim.

Independent of its Equal Protection challenge, MOVE asks this Court to order that the existing public health advisories regarding COVID-19 satisfy the statutory requirement of a physician's certification and waive that requirement as part of a late application for an absentee ballot for voters who are diagnosed with COVID-19 after the deadline for a regular application. This Court has previously issued orders modifying provisions of the

election code when necessary to facilitate an orderly election process. PX 15 (order aligning dates and petition requesting date alignment).

State and federal executive and public health agencies have issued mandatory orders and guidelines relating to COVID-19, including the requirement to self-quarantine or isolate after a positive diagnosis of COVID-19. These orders and guidelines include:

- Austin Public Health (“APH”) adopted Health Advisory Rules on August 14, 2020, that are in effect until November 12, 2020. Rule 2.4.3.3 of the applicable APH Rules mandates that an individual who has tested positive for COVID-19 shall “remain in home quarantine for at least 10 days after symptoms first appeared, at least 24 hours with no fever without fever-reducing medication, and symptoms have improved.”<sup>2</sup> PX 16 (APH Rules).
- Texas Governor Greg Abbott issued Executive Order GA-32, which provides that individuals should comply with “minimum standard health protocols from the Texas Department of State Health Services (DSHS).” DSHS protocols, in turn, advise a quarantine period and rely on Guidelines issued by the Centers for Disease Control (“CDC”).<sup>3</sup> PX 17 (Executive Order GA-32).
- The federal Centers for Disease Control (“CDC”) has issued guidelines, updated September 10, 2020, stating that people who have been diagnosed with COVID-19

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<sup>2</sup> The APH order is available at: <https://www.austintexas.gov/sites/default/files/files/Health/8-14-20-Emergency-Rules-Adoption-Notice-Health-Authority-Rules.pdf>.

<sup>3</sup> Executive Order GA-32 is available at: [https://gov.texas.gov/uploads/files/press/EO-GA-32\\_continued\\_response\\_to\\_COVID-19\\_IMAGE\\_10-07-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf).

or are exhibiting symptoms should quarantine: “Do not leave your home except to get medical care. Do not visit public areas.”<sup>4</sup> PX 18 (CDC Guidelines).

Under these state and federal orders and guidelines, a voter who tests positive for COVID-19 after the 11-day cutoff must quarantine at home and cannot leave home to secure a doctor’s certification for purposes of the late absentee ballot or to vote in person. The orders and guidelines reflect a determination by public health authorities that a positive diagnosis of COVID-19, on its own, requires that the person remain in quarantine. Moreover, the APH and Governor’s orders are mandatory and subject to civil enforcement.

The gravamen of these public health orders is that a voter who has tested positive for COVID-19 must not vote in person and risk infecting other voters and poll workers. They need to stay home, and this Court has the authority to issue orders to facilitate an orderly election as it did before the July 2020 election. PX 15. MOVE asks this Court to order that a positive diagnosis of COVID-19, in light of the applicable public health and executive orders and guidelines requiring quarantine for persons who have tested positive for COVID-19, satisfies the statutory requirement for a doctor’s certification under § 102.002 of the Texas Election Code. That is because a positive diagnosis within the pertinent time frame *by definition* is a sickness that would “prevent [the voter] from appearing at the polling place for an election” to be held within 11 days or fewer. Applying the orders to satisfy the doctor’s certification requirement would allow a voter to secure an absentee ballot based on a self-certification.

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<sup>4</sup> The CDC guidelines are available at: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>.

The SOS has acknowledged that a court order can properly waive the requirement of a doctor's certification for purposes of a late ballot application. Specifically, the SOS has issued guidance to local election officials suggesting that quarantine orders can properly support a court order waiving the doctor's certification requirement for purposes of securing a late absentee ballot:

Expanding Eligibility Requirements Under Chapter 102 (Late Voting for Sickness or Physical Disability): A court order could provide for a temporary expansion of the eligibility requirements for Chapter 102 voting to allow voters in quarantine to vote in this fashion. This option would also require the court, in some instances, to temporarily waive or modify the requirement for a physician's signature on the application for this type of late ballot for purposes of any election(s) impacted by COVID-19.

PX 13 (SOS Election Advisory 2020-14).<sup>5</sup> MOVE's request for a court order thus exactly mirrors the SOS guidance regarding potential modification or waiver of the doctor's certification requirement for late COVID-19 diagnoses.

Construing § 102.002 in this way would ensure that any voter who is diagnosed with COVID-19 after the Oct. 23 deadline will be able to self-certify as to a disability and secure an absentee ballot based on the applicable public health orders.

C. Probable, imminent, and irreparable harm

"An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Only declaratory and

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<sup>5</sup> SOS Advisory 2020-14 is available at: <https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml>.

injunctive relief are available to MOVE at law, therefore its injuries are necessarily non-compensable.

Due to the unconstitutional doctor's certification requirement and Defendants' enforcement thereof, MOVE will suffer irreparable harm from having to allocate its scarce resources to assist voters in securing doctors' certifications in order to secure late absentee ballots. MOVE's interest is intimately related to the interest of Texas voters, who will suffer irreparable harm by having their constitutionally and statutorily protected right to vote infringed during the November 3, 2020 general election. *Williams v. Salerno*, 792 F.2d 323, 326 (2nd Cir. 1986) (plaintiffs suffer irreparable harm if their right to vote is impinged upon); *Obama for Am.*, 697 F.3d at 436 ("A restriction on the fundamental right to vote . . . constitutes irreparable injury"). There is no question that the imminent threat of disenfranchisement constitutes an irreparable injury, as voting is a fundamental right and the loss of that right cannot be remedied by monetary damages. Indeed, "the right to vote is not something that can ordinarily be replaced by any amount of money." *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at \*4 (D. N.D. Oct. 21, 2010).

"Once a citizen is deprived of his right of suffrage in an election there is usually no way to remedy the wrong. There is no process for ordering 're-votes' . . . Once an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election."

*Id.* at 5; *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce [an] election occurs, there can be no do-over and no redress.").

It is no answer to say "let's wait and see what it looks like after October 23" before allowing individuals with a late diagnosis of COVID-19 to self-certify to obtain a late

absentee ballot. Forestalling the decision regarding the necessity of a doctor's certification risks disenfranchising an untold number of Texans.

More to the point, MOVE's voter education and engagement efforts like the telemedicine program take time to plan and develop. Each day and each dollar that MOVE spends on developing the telemedicine program represents more potential voters that MOVE could otherwise be engaging—through direct contact or indirect mass communication—and each day missed equates to voters who will not be engaged. MOVE would be engaging in voter education and turnout activities but for the need to do that preparation and allocate its scarce resources to the telemedicine program that will actively operate from October 23 through election day.

There is no way to compensate MOVE for the lost opportunities to engage and educate potential Texas voters between now and a full trial on the merits. This could hold true even if it were a for-profit entity, but definitely holds true in this case because it is a non-profit civic engagement entity. *Cf. SBI Investments, LLC v. Quantum Materials Corp.*, No. 03-17-00863-CV, 2018 WL 1191854, at \*6 (Tex. App.—Austin Mar. 8, 2018, no pet.) (quoting *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.] 2011, pet. dismissed) (“Texas courts have recognized that ‘business disruptions’ may result in irreparable harm for which a temporary injunction is appropriate.”)). Therefore, MOVE's injuries are not only probable and imminent, they are currently ongoing.

MOVE, as a voter engagement organization, is hampered by having its resources diverted from its typical education and voter-outreach efforts during a critical election year. It therefore faces a probable, imminent injury if a temporary injunction is not granted.

1. The injury to MOVE outweighs any alleged injuries to the County or State.

There are no costs associated with waiving the doctor's certification requirement of the late absentee ballot application procedures to allow voters with a late COVID diagnosis to apply for a ballot without a doctor's certification. There is no apparent state interest in requiring this certification, apparent by the fact that similar certification is not required for any other voter who votes absentee. The Travis County Clerk has testified that an order enjoining or waiving the doctor's certification requirement would not significantly change her procedures or how she handles late absentee ballot applications. Her testimony indicates that, if anything, enjoining or waiving that requirement would make the procedures more efficient by negating the need to check a separate doctor's certification.

2. A temporary injunction would serve the public interest.

The public interest lies in greater voter participation and access to the polls, and lies in MOVE's favor. This is particularly true here, where tens of thousands of Texans will likely be diagnosed with COVID-19 after the October 23 deadline for a vote-by-mail ballot. *See Husted*, 697 F.3d at 437 (public interest favors permitting as many qualified voters to vote as possible); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 184 (1979) (holding that "voting is of the most fundamental significance under our constitutional structure"). Granting this petition will ease voting for all of these sick Texans and will create a regulatory scheme that better promotes equal access for all Texans.

D. This case is ripe.

For many of the same reasons that MOVE needs immediate relief, this case is also ripe. MOVE's allocation of resources to the telemedicine program is not a "hypothetical contingency that has not come to pass." SOS Brief p.11. While a particular voter getting a late diagnosis of COVID-19 and needing a doctor's certification (or relief from the requirement of a doctor's certification) may be a hypothetical contingency, MOVE's planning and allocation of resources to protect against that contingency is very real. MOVE has already allocated significant resources (both time and money) to the telemedicine program. But if the Court enjoins the doctor's certification requirement, it can release those resources *now*—even before the cutoff date for a regular absentee ballot—and allocate those resources to other voter education and outreach activities.

For the same reason, MOVE is not seeking an advisory opinion. An injunction in this action will allow MOVE to reallocate its resources from the telemedicine program to other programs. This is concrete relief based on existing facts.

E. The SOS's immunity argument fails.

The State attempts to reassert its standing and ripeness arguments under the guise of a governmental immunity argument on behalf of Defendant DeBeauvoir; however, its governmental immunity arguments fail for the same reasons its standing and ripeness arguments fail.

Section 273.081 of the Texas Election Code states that a "person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or



occurring.” This section permits suits for injunctive relief against those administering the Election Code: the SOS and counties. Any other reading would render the provision meaningless.

The SOS offers no case law to the contrary. The SOS relies primarily on *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011). In fact, in *Andrade*, a suit against the SOS, the Court recognized that § 273.081 authorizes injunctive relief and abrogates sovereign immunity when a viable claim is stated. *Id.* at 11 (“We turn then to the merits of the voters’ Equal Protection challenge, cognizant that the Secretary retains immunity from suit unless the voters have pleaded a viable claim.”); *see also In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002) (“As is evident, the Legislature has specifically called upon the courts [under section 273.081] to exercise their equitable powers to resolve election code violations.”); *Taylor v. Margo*, 508 S.W.3d 12, 19–20 (Tex. App.—El Paso 2015) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009), in the Election Code context and holding that “[s]uits to require state official to comply with statutory or constitutional provisions are not prohibited by sovereign immunity.”). For all the reasons discussed above, MOVE has standing and a probable right of relief, and therefore injunctive relief against Defendants is authorized.

Indeed, the Fifth Circuit just yesterday rejected a similar argument by the State and held that the SOS is a proper party in a voting rights suit challenging the application requirements for an absentee ballot under the Texas Election Code. *Tex. Democratic Party*

*v. Abbott*, No. 20-50407, slip op. at 12-13 (5th Cir. Oct. 14, 2020)<sup>6</sup> (holding that the SOS as the “chief election officer of the state” was a proper defendant, and finding “a sufficient connection between the official sued and the statute challenged” where the “Secretary’s general duties under the Code include issuance of directives and instructions, being willing to ‘assist and advise’ local officials, and endeavoring to ‘obtain and maintain uniformity in the application, operation, and interpretation’ of the Election Code”); *see also OCA-Greater Houston*, 867 F.3d at 613 (holding that the “invalidity of a Texas election statute is, without question, fairly traceable to and redressable by . . . its Secretary of State, who serves as the ‘chief election officer of the state.’”) (quoting Tex. Elec. Code § 31.001(a)).

The SOS’s other arguments for why injunctive relief is not authorized against governmental entities are not arguments about immunity, but rather the SOS’s disagreement on the merits (SOS PTJ pp. 14-24), which have been addressed above. MOVE has been harmed and is in danger of being harmed by § 102.002 of the Texas Election Code; accordingly, injunctive relief is authorized.

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<sup>6</sup> This opinion is the merits panel decision on a constitutional challenge to the absentee qualification. The earlier motions panel opinion in the same case is *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). The new merits panel opinion expressly rejected the prior motions panel’s determination that a rational basis inquiry applies to Equal Protection challenges to the Texas absentee ballot requirements. No. 20-50407 at slip op. at 36-37. The opinion also rejected the prior motions panel’s reliance on *McDonald* for the applicable standard. *Id.* (citing *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807–08 (1969)). The opinion is clear in its criticism of the panel opinion: “We therefore use our authority as the panel resolving the merits to declare that the holdings in the motions panel opinion as to *McDonald* are not precedent.” *Id.* at 37. The SOS’s arguments regarding Equal Protection and application of rational basis scrutiny rely heavily on the discredited panel opinion and *McDonald*. *See* SOS PTJ pp. 15-18.

PRAYER

MOVE respectfully prays for the following relief: a temporary injunction against Defendants enjoining the requirement for a doctor's certification under Texas Election Code § 102.002 as to any voter who is diagnosed positive for COVID-19 after the 11-day cutoff and ordering Defendants to accept and process late ballot applications without a doctor's certification.

Dated: October 15, 2020.

Respectfully submitted,

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# App. 5



**NO. D-1-GN-20-005507**MOVE TEXAS ACTION FUND,  
*Plaintiff,*

v.

DANA DeBEAUVOIR, in her official  
capacity as Travis County Clerk, and  
RUTH HUGHS, in her official capacity as  
Texas Secretary of State,  
*Defendants.*§  
§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

419th JUDICIAL DISTRICT

**APPENDIX TO PLAINTIFF'S RESPONSE TO PLEA TO THE JURISDICTION  
AND BRIEF IN SUPPORT OF TEMPORARY INJUNCTION**

Plaintiff, MOVE Texas Action Fund, hereby files this Appendix to Plaintiff's  
Response to Plea to the Jurisdiction and Brief in Support of Temporary Injunction.

**INDEX TO APPENDIX OF EXHIBITS**

## Exhibit Number and Description

1. MOVE Program Plan
2. Linda Harrison Declaration
3. Dr. Ryan McCorkle Declaration
7. AG Mail in Ballot Guidance Letter
10. Texas Demographics
11. Texas COVID-19 Demographics
12. Travis County Key Indicators Graph
13. Secretary of State Election Advisory 2020-14
14. City of Austin Advisory Regarding Free COVID-19 Testing
15. Travis County Clerk's Counter-Petition and Order Modifying Voting Procedures
16. City of Austin 8-14-20 Emergency Rules Adoption Order
17. Governor's October 7, 2020 Order GA-32
18. CDC COVID-19 "What to Do If You Are Sick" Guidelines
19. Texas Tribune Article on COVID-19 Fatalities and Racial Disparities

Respectfully submitted,

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**Attorneys for Plaintiff**

## **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing pleading was served via email on counsel, as indicated below, on the 16th day of October, 2020.

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Texas Secretary of State

/s/ Kennon L. Wooten  
Kennon L. Wooten



## **Texas Emergency Ballot Telemedicine Program MOVE Texas Action Fund**

### **About MOVE Texas Action Fund**

MOVE Texas Action Fund is a 501(c)(4) grassroots, nonpartisan nonprofit organization building power for underrepresented youth communities through civic education, leadership development, and issue advocacy.

### **The Problem: Texas' Onerous Emergency Ballot Law**

Texas is a state of Black and Latino young people: 41% of Texans are under the age of 30 years old and of this group, 63% are people of color. Since March 2020, COVID-19 has spread quickly across the state and has impacted Black and Latino communities the hardest. Young Texans, vital to the state's economy and the majority of higher education's population, have remained on the razor's edge of contracting COVID-19.

In normal times, Texas makes voting difficult. In the middle of a global pandemic and during one of the most important election cycles of our generation, voting in Texas for young people of color will be harder than ever this November. The Texas Supreme Court refused to explicitly expand voting by mail to individuals under the age of 65 years old, instead opting for a "don't ask, don't tell" system instructing voters to make their own decision to employ the disability option. Meanwhile, Texas Attorney General Ken Paxton has threatened civic organizations and voters with criminal voter fraud charges if vote by mail via disability is widely utilized, chilling communication and participation to voters in need across the state. Texas is now the largest in-person voting state in the nation.

Because Texas' primary election was held in early March 2020, the impacts of COVID-19 were not felt during an election cycle until the primary runoff elections in early July. For the first time, Texas saw voters contract the novel coronavirus *during* early voting. For these voters, the risk of disenfranchisement was skyhigh. Because the vote by mail deadline occurs eleven (11) days before Election Day, these voters had two options: 1) Vote in-person at a polling location while contagious and risk infecting other voters and poll workers, or 2) Request an emergency ballot.

To request an emergency ballot in Texas, voters must prove their illness or disability occurred after the vote by mail deadline to their local county election department. Texas Election Code requires the voter to obtain a signed waiver by a "physician, chiropractor, or practitioner" ([Texas Election Code Sections 102.001 & 102.003](#)).



"This is to certify that I know that \_\_\_\_\_ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after \_\_\_\_\_.

"Witness my hand at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
(signature of physician,  
chiropractor, or practitioner)"

Voters who opted to employ their legal right to an emergency ballot in Texas were faced with nearly insurmountable obstacles:

- Obtaining a waiver from a physician was nearly impossible due to the inability to get an appointment within a matter of days due to COVID-19 infection rates and safety protocols;
- For those who could see a doctor, there were co-pays or out-of-pocket expenses incurred to obtain the waiver;
- Voters then had to find a representative, risking this person's health, to submit the emergency ballot application and signed waiver in-person at the local elections office;
- The representative then had to return the emergency ballot in person to the voter to be completed and sealed;
- Once sealed, only the representative who applied for the emergency ballot for the voter could return it to the local elections office, further risking infection and spread of COVID-19.

On July 14, 2020, the Texas Civil Rights Project (TCRP) filed a lawsuit against the Travis County Clerk on behalf of two voters, Linda Elizabeth Harrison and Vernon Webb, who both tested positive for COVID-19 and were unable to obtain emergency ballots to exercise their right to vote. Elizabeth and Vernon could not vote in person without potentially exposing others to the virus and thus risking additional lives in the process. They were both confirmed positive for COVID-19 after the deadline to apply for a vote by mail ballot and were unsuccessful in navigating the State's extremely burdensome process for obtaining an emergency ballot.

The Texas emergency ballot system is unfair, unjust, and because of our capitalist healthcare system, equates to a poll tax. If nothing is done, this will disenfranchise thousands and thousands of voters in late October and early November during this important Presidential election.



David Waldman-1, of Yorktown LLC™  
@KagroX

Replying to @KagroX

Top ten state reports of new cases of COVID-19, 9/27:

1. Texas +4,085
2. California +3,166
3. Wisconsin +1,726
4. Illinois +1,709
5. Kansas +1,571
6. Michigan +1,329
7. New York +996
8. Ohio +934
9. Missouri +924
10. Minnesota +904



The Center for Disease Control and Preventions has warned COVID-19 and influenza this fall will increase infection rates, and Texas is already seeing the early warning signs. As of late September 2020, COVID-19 cases in Texas are rapidly increasing, growing faster than any other state in the nation. Because young people have been forced to continue working and going to college, these Texas voters are most at risk to contract COVID-19. Young voters are often forced to learn voting systems without the support of state civic education programs. If forced to vote by emergency ballot, these voters will most certainly be disenfranchised, leaving our generation silenced at the ballot box in the most important election of our generation.

### **The Solution: Expand Access to Emergency Ballots Virtually By Telemedicine**

Obtaining no-cost access to a physician who can determine if an emergency ballot waiver should be issued is the important point of access to helping eligible voters in need during the final days of the election this year.

MOVE Texas Action Fund will build a volunteer doctor telemedicine system to support these young, low-income voters of color in the final eleven days before Election Day. This system will be available to all Texans from October 23, 2020 through November 3, 2020.

#### **Program User Design**

- Client calls a toll-free number advertised through social media and Election Protection networks (i.e. 888-911-VOTE);
- Client gives basic contact information, voting status, and schedule availability to one of two paid MOVE Texas part-time employees (Staff Member) via [Grasshopper](#);
- Staff Member schedules [Zoom](#) meeting with a volunteer physician, chiropractor, or practitioner (Physician), preferably within 24 hours;
- Staff Member sends liability waiver via [DocuSign](#) and appointment information to Client and Physician;
- At the scheduled appointment time, Client and Physician meet via Zoom video call to discuss the emergency ballot waiver. MOVE Texas does not have any access to any medical information or records nor does not control the determination of the outcome of the meeting.
- If approved, the Physician issues the signed waiver via email to the Client. If not approved, the Physician issues a denial letter.
- Staff Member keeps an internal record of if the Client attended the appointment as scheduled.

Due to the sensitive nature of this work, MOVE Texas Executive Director H. Drew Galloway will personally lead this program. He will be supported by Executive Associate Mia Balderas and two paid Legal Interns.



## Program Goals and Outcomes

Through this program, we will help at least 500 eligible voters connect with volunteer physicians to expand their access to the emergency ballot. We anticipate the cost per vote to be \$42.

## Program Budget

<i>Category</i>	<i>Item</i>	<i>Cost</i>
Payroll	Executive Director	\$3,710
Payroll	Executive Associate	\$1,760
Payroll	Legal Interns	\$3,750
Technology	Grasshopper Telephone System	\$250
Technology	Zoom Conference System	\$400
Technology	Docusign	\$400
Legal	Healthcare Lawyer Fees	\$2,500
Legal	Election Lawyer Fees	\$2,500
Advertising	Social Media Advertisement	\$5,000
Advertising	Election Protection Outreach	\$1,000
Advertising	Volunteer Doctor Recruitment	\$500
Total		\$21,370



MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
v.	§	
	§	
	§	OF TRAVIS COUNTY, TEXAS
DANA DeBEAUVOIR, in her official	§	
capacity as Travis County Clerk, and RUTH	§	
HUGHS, in her official capacity as Texas	§	
Secretary of State,	§	419th JUDICIAL DISTRICT
<i>Defendants.</i>	§	

**DECLARATION OF LINDA ELIZABETH HARRISON**

1. My name is Linda Elizabeth Harrison, my date of birth is **REDACTED**, and my address is **REDACTED**. I am a registered voter in Travis County, Texas. I am currently married to Vernon Webb, a registered voter in Travis County, Texas, currently residing at **REDACTED**.

2. I am not a party to this case, but provide this declaration to explain the burden imposed on my husband and myself during the July 14, 2020 primary run-off election by Texas's late ballot procedure.

3. For the July 14, 2020 primary run-off election, my husband and I had each planned to vote in person, in different primaries.

4. However, on June 30, 2020, I was tested for COVID-19 by LabCorp because I had begun experiencing symptoms of the disease, including coughing and congestion.

5. On July 2, 2020, I received informal test results from an online portal that indicated I was positive for COVID-19. I immediately began practicing self-quarantining while I awaited final test results.

6. Because I had received a preliminary positive test result, my husband, Vernon Webb was also tested for the disease on July 4, 2020, and immediately began practicing self-quarantining while awaiting his test results.

7. On or about July 5, 2020, a physician contacted me and confirmed that I was positive for COVID-19 and instructed me to continue quarantining.

8. On or about July 9, 2020, my husband received the results from his test stating he was also positive for COVID-19.

9. My husband and I each experienced severe symptoms from COVID-19, including respiratory problems and fatigue, extending well beyond the July 14th Election Day. While under medical orders to quarantine, neither of us could visit a polling location in person to vote without a likelihood of injuring our health or spreading disease to other non-infected individuals. Additionally, severe symptoms from the disease prevented us from engaging in curbside voting.

10. On July 13, 2020, after symptoms of COVID-19 had not subsided, I investigated the procedure for voting absentee in the July 14th election. At that time, I learned that the deadline to self-certify my condition and vote by mail had passed on July 3, 2020, prior to receiving my final test results, and that in order to vote with a late absentee ballot, I would need to provide a physician's certificate.

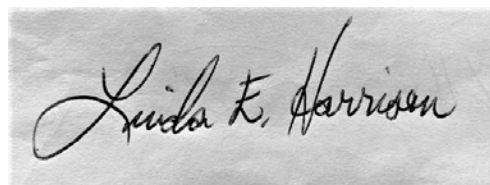
11. On July 13, 2020, I contacted my medical care provider's office in order to attempt to obtain a physician's certificate confirming that I developed an illness that prevented me from voting in person on or after the deadline for applying to vote by mail. The nurse told me to email the office with my request. By the afternoon of Election Day, July 14th, I had still received no response. My husband, on the other hand, had no primary care physician with whom he was in

regular contact, and therefore did not have the ability to even request this physician's certificate on short notice.

12. With no other options but to be prevented from voting, my husband and I contacted voting rights advocates to explore our options, and ultimately filed an emergency lawsuit requesting a waiver of the physician's certificate requirement on Election Day. Without a hearing or an explanation, the visiting judge assigned to the case denied our request.

13. After numerous repeated contacts with my physician's office, and providing insurance information, I was finally able to get a physician's certification at the last possible moment on Election Day and vote. My husband was not able to do so and was prevented from voting entirely.

I declare under penalty of perjury that the facts stated above are true and correct to the best of my personal knowledge. Executed in Travis County, State of Texas, on the 12th day of October, 2020.

A handwritten signature in cursive script, reading "Linda E. Harrison", written in black ink on a light-colored background.

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**Linda Elizabeth Harrison**

**NO. D-1-GN-20-005507**

MOVE TEXAS ACTION FUND,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
v.	§	
	§	
	§	OF TRAVIS COUNTY, TEXAS
DANA DeBEAUVOIR, in her official	§	
capacity as Travis County Clerk, and	§	
RUTH HUGHS, in her official capacity	§	
as Texas Secretary of State,	§	419th JUDICIAL DISTRICT
<i>Defendants.</i>	§	

**DECLARATION OF RYAN J. McCORKLE, M.D., M.P.H.**

1. I am Board Certified in Emergency Medicine by the American Board of Emergency Medicine (ABEM). I received my Doctor of Medicine (M.D.) from the University of Texas Health Science Center at San Antonio School of Medicine at San Antonio, Texas. I completed my Emergency Medicine residency program at SUNY at the Buffalo Department of Emergency Medicine. I also received my Master's in Public Health (M.P.H.) at the University of Texas Health Science Center Houston School of Public Health.

2. I currently serve as an Emergency Medicine physician with St. David's. I am also an Associate Professor of Emergency Medicine at Texas A&M School of Medicine. In addition, I am a co-founder of At Home Docs, LLC. I previously served as an Emergency Medicine physician at Florida Hospital Orlando and an Assistant Professor of Emergency Medicine at the University of Central Florida College of Medicine.

3. I have authored multiple studies published in reputable peer-reviewed medical journals, and have made numerous appearances on Austin local TV news shows

to advise on a range of issues concerning medicine and health. I have also been a Backstage Medical Physician for the last decade at ACL Music Festival and local Austin music venues, such as ACL Live Moody Theater, Germania Insurance Amphitheater (formerly Austin 360), Stubb's, Antone's, Emo's and many more. Further, I regularly serve as a St. David's HealthCare Event Medical Team Physician for University of Texas football games.

4. I have treated hundreds of patients diagnosed with COVID-19, which is an infectious disease caused by the virus known as SARS-CoV-2. There are currently two types of tests used to diagnose an active COVID-19 infection: molecular tests and antigen tests. A molecular test detects genetic material of the virus using a lab technique called polymerase chain reaction (PCR). PCR testing has generally been limited to individuals who are already exhibiting symptoms of COVID-19. There are several public testing sites, but it can often take more than a day to obtain a testing appointment. To perform a PCR test, a health care worker collects fluid from a nasal or throat swab or from saliva. At many testing locations, PCR tests are administered by nurses or technicians without the assistance of or contact with a physician. Further, many testing locations do not analyze PCR tests onsite but instead send them to a lab to be analyzed. It often takes several days for individuals to receive the results of a PCR test.

5. Antigen tests detect certain proteins in the virus. Using a nasal or throat swab to get a fluid sample, antigen tests can produce results in minutes or hours. Antigen tests are currently available at certain private health care providers. Some providers require the patient to administer the test themselves. Others offer tests only to asymptomatic

individuals. Although some providers give results to patients at the testing location minutes after collecting the sample, others send results to patients hours later after they have left the location. At many providers, a patient will have the test administered and receive results without contact with a physician.

6. Standard medical guidance for a person who receives a positive COVID-19 test—even a person who is currently asymptomatic—is to limit physical activity, rest, and drink plenty of fluids. This is important for the person’s health because physical exertion and/or dehydration could exacerbate COVID-19 symptoms. Specifically, exertion could significantly exacerbate underlying pulmonary and cardiac tissue damage known to occur secondary to COVID-19 infection. Exertional hypoxia could lead to loss of consciousness with subsequent injury or even myocardial infarction. Even driving can injure the health of an individual who has moderate COVID-19 symptoms, such as fever, fatigue, or difficulty breathing. Driving while febrile could lead to metabolic encephalopathy & delirium with injury to the driver and others on the road. Dyspnea could also increase to the point of loss of consciousness while operating a vehicle.

7. Voting in person before or on election day requires individuals to drive to the polling location and potentially stand in long lines, including possibly outdoors without shade or access to sufficient water. As explained above, these activities could injure the COVID-19 infected person by a variety of pathophysiology, from exacerbating intrinsic pulmonary and cardiac tissue damage to traumatic injury due to loss of consciousness. For these reasons, it is my opinion that a person who receives a positive test for COVID-19—whether a molecular test or an antigen test—within the eleven-day period preceding

election day faces a likelihood that voting in person at a polling place will injure that person's health.

8. Independent of the likelihood that voting in person could injure an infected person's own health, requiring an infected person to vote in person threatens the health of other voters, election workers, and any other individuals the person comes into contact with in the process of voting in person. Indeed, city and state public health authorities have issued guidance that people who have tested positive for COVID-19 should self-quarantine for 14 days after diagnosis or the onset of symptoms. The Centers for Disease Control and Prevention (CDC) has also issued guidance that individuals even exposed to COVID-19 should self-quarantine for 14 days and monitor themselves for symptoms. This guidance is to protect other members of the public from contracting COVID-19 from an infected person.

My name is Ryan J. McCorkle, M.D., M.P.H., my date of birth is [REDACTED], and my address is [REDACTED], United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 14th day of October, 2020.

/s/ Ryan J. McCorkle  
**Dr. Ryan McCorkle, M.D., M.P.H.**



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 1, 2020

To: County Judges and County Election Officials

Re: Ballot by Mail Based on Disability

Due to misreporting and public confusion, the Texas Attorney General provides this guidance addressing whether a qualified voter, who wishes to avoid voting in-person because the voter fears contracting COVID-19, may claim a disability entitling the voter to receive a ballot by mail regardless of whether the voter would need personal assistance to vote in-person or risk injuring their health because of a sickness or physical condition. Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail. Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.

The Election Code establishes specific eligibility requirements to obtain a ballot by mail for early voting. TEX. ELEC. CODE §§ 82.001–.004. While any qualified voter is eligible to early vote by personal appearance, the Legislature has limited access to early voting by mail for individuals who meet specific qualifications. Section 82.002 of the Election Code, titled “Disability,” allows a qualified voter to early vote by mail “if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.” *See id.* § 82.002(a). Thus, a voter has a disability under this section and, therefore, is eligible to receive a ballot by mail if:

- (1) the voter has a sickness or physical condition; *and*
- (2) the sickness or physical condition prevents the voter from appearing in-person without:
  - (a) needing personal assistance; *or*
  - (b) injuring the voter’s health.

**PLAINTIFF'S  
EXHIBIT  
07**

Only a qualifying sickness or physical condition satisfies the requirements of section 82.002. The Election Code does not define “sickness” or “physical condition.”<sup>1</sup> The

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<sup>1</sup> Our objective in construing a statute is to give effect to the Legislature’s intent, which requires us to examine the statute’s plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). In determining the plain meaning of undefined words in a statute, we consult dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018); *see* Tex. Att’y Gen. Op. KP-



common understanding of the term “sickness” is “the state of being ill” or “having a particular type of illness or disease.” NEW OXFORD AM. DICTIONARY 1623 (3d ed. 2010).<sup>2</sup> A person ill with COVID-19 would certainly qualify as having a sickness. However, a reasonable fear of contracting the virus is a normal emotional reaction to the current pandemic and does not, by itself, amount to a “sickness,” much less the type of sickness that qualifies a voter to receive a ballot by mail under Election Code section 82.002.

In addition to “sickness,” the Election Code allows voters to vote by mail if they have a “physical condition” that prevents them from appearing at the polling place without assistance or without injury to their health. TEX. ELEC. CODE § 82.002(a). “Physical” is defined as “of or relating to the body as opposed to the mind.” NEW OXFORD AM. DICTIONARY 1341 (3d ed. 2010). “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a physical condition is an illness or medical problem relating to the body as opposed to the mind. To the extent that a fear of contracting COVID-19, without more, could be described as a condition, it would at most amount to an emotional condition and not a physical condition as required by the Election Code to vote by mail. Thus, under the specifications established by the Legislature in section 82.002 of the Election Code, an individual’s fear of contracting COVID-19 is not, by itself, sufficient to meet the definition of disability for purposes of eligibility to receive a ballot by mail.

To the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041. TEX. ELEC. CODE § 84.0041 (providing that a person commits an offense if the person “intentionally causes false information to be provided on an application for ballot by mail”); *see also id.* § 276.013 (a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail). However, whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.

A lawsuit recently filed in Travis County District Court does not change or suspend these requirements. In that case, the District Court ordered the Travis County Clerk to accept mail ballot applications from voters who claim disability based on the COVID-19 pandemic, and to tabulate mail ballots received from those voters. The Texas Attorney General immediately appealed that order. Accordingly, pursuant to Texas law, the District Court’s order is stayed and has no effect during the appeal. Moreover, even if the order were effective, it would not apply to any county

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0009 (2015) (concluding that to be able to vote by mail, a voter must satisfy the standard of disability established under section 82.002, and that standards of disability set in other unrelated statutes are not determinative).

<sup>2</sup> *See also* Tex. Att’y Gen. Op. KP-0149 (2017) (noting that a behavioral abnormality of a sexually violent predator sufficient to result in civil commitment qualifies as a sickness, understood as an “unsound condition” or disease of the mind, under section 82.002(a)).

clerk or election official outside of Travis County. Those officials must continue to follow Texas law, as described in this letter, concerning eligibility for voting by mail ballot.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large, prominent "K" and "P".

KEN PAXTON  
Attorney General of Texas

ESTIMATES OF THE  
POPULATION BY AGE, SEX, AND RACE/ETHNICITY  
FOR JULY 1, 2018  
FOR  
STATE OF TEXAS

AGE	TOTAL			NH WHITE			NH BLACK			NH ASIAN			NH OTHER			HISPANIC		
	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE
ALL	28,702,243	14,254,981	14,447,262	12,008,303	5,953,354	6,054,949	3,394,972	1,642,708	1,752,264	1,381,899	677,090	704,809	629,148	312,300	316,848	11,287,921	5,669,529	5,618,392
<1	389,277	198,709	190,568	114,969	58,905	56,064	46,083	23,444	22,639	16,580	8,469	8,111	17,102	8,778	8,324	194,543	99,113	95,430
1	395,402	201,725	193,677	117,408	60,141	57,267	46,604	23,645	22,959	16,511	8,468	8,043	17,255	8,835	8,420	197,624	100,636	96,988
2	407,861	208,076	199,785	122,987	62,939	60,048	47,786	24,247	23,539	17,479	8,955	8,524	17,292	8,840	8,452	202,317	103,095	99,222
3	417,497	213,195	204,302	127,819	65,480	62,339	48,419	24,499	23,920	17,931	9,220	8,711	17,230	8,795	8,435	206,098	105,201	100,897
4	417,976	213,515	204,461	129,037	66,082	62,955	48,001	24,352	23,649	18,649	9,622	9,027	16,867	8,640	8,227	205,422	104,819	100,603
5	414,093	211,589	202,504	128,485	65,803	62,682	47,127	23,968	23,159	18,608	9,624	8,984	16,216	8,325	7,891	203,657	103,869	99,788
6	408,852	208,682	200,170	127,181	65,123	62,058	46,231	23,509	22,722	17,985	9,327	8,658	15,414	7,927	7,487	202,041	102,796	99,245
7	410,984	209,446	201,538	127,638	65,301	62,337	46,505	23,605	22,900	17,838	9,214	8,624	14,795	7,605	7,190	204,208	103,721	100,487
8	394,642	200,369	194,273	122,664	63,053	59,611	44,733	22,431	22,302	16,183	8,274	7,909	13,486	6,832	6,550	197,576	99,779	97,797
9	407,878	207,316	200,562	127,290	65,152	62,138	47,382	23,878	23,504	16,995	8,683	8,312	13,771	6,983	6,788	202,440	102,620	99,820
10	415,591	211,534	204,057	129,816	66,480	63,336	48,694	24,655	24,039	17,782	9,099	8,683	13,701	6,976	6,725	205,598	104,324	101,274
11	416,632	212,322	204,310	130,814	67,143	63,671	49,238	25,121	24,117	17,540	8,917	8,623	13,172	6,764	6,408	205,868	104,377	101,491
12	412,382	210,238	202,144	130,437	67,264	63,173	48,958	24,684	24,274	17,444	8,857	8,587	12,714	6,538	6,176	202,829	102,895	99,934
13	410,258	209,249	201,009	130,520	67,187	63,333	48,483	24,407	24,076	17,512	8,949	8,563	12,375	6,286	6,089	201,368	102,420	98,948
14	407,973	208,135	199,838	131,262	67,583	63,679	48,321	24,406	23,915	17,690	8,950	8,740	11,944	6,140	5,804	198,756	101,056	97,700
15	405,223	206,800	198,423	131,812	68,035	63,777	48,241	24,472	23,769	17,422	8,836	8,586	11,519	5,856	5,663	196,229	99,601	96,628
16	404,786	207,389	197,397	132,427	68,463	63,964	48,934	24,988	23,946	17,252	8,839	8,413	11,128	5,693	5,435	195,045	99,406	95,639
17	412,710	211,814	200,896	136,256	70,678	65,578	50,187	25,761	24,426	18,388	9,482	8,906	11,240	5,773	5,467	196,639	100,120	96,519
18	420,708	216,133	204,575	141,740	73,487	68,253	52,360	26,765	25,595	18,545	9,551	8,994	11,189	5,750	5,439	196,874	100,580	96,294
19	418,538	215,272	203,266	144,396	74,995	69,401	52,075	26,691	25,384	18,097	9,302	8,795	11,093	5,670	5,423	192,877	98,614	94,263
20	407,004	210,041	196,963	140,799	73,348	67,451	51,436	26,521	24,915	18,361	9,467	8,894	10,835	5,520	5,315	185,573	95,185	90,388
21	409,527	210,527	199,000	144,000	74,731	69,269	51,957	26,606	25,351	19,443	9,887	9,556	10,786	5,431	5,355	183,341	93,872	89,469
22	412,567	212,207	200,360	146,337	75,793	70,544	52,673	27,142	25,531	20,198	10,383	9,815	10,679	5,289	5,390	182,680	93,600	89,080
23	416,796	214,155	202,641	148,149	76,636	71,513	55,004	28,214	26,790	20,663	10,489	10,174	10,601	5,329	5,272	182,379	93,487	88,892
24	424,870	218,109	206,761	152,684	78,637	74,047	57,290	29,428	27,862	21,718	10,906	10,812	10,520	5,305	5,215	182,658	93,833	88,825
25	430,951	221,256	209,695	155,684	80,221	75,463	59,430	30,517	28,913	21,893	10,970	10,923	10,328	5,177	5,151	183,616	94,371	89,245
26	433,197	222,282	210,915	158,217	81,560	76,657	59,576	30,449	29,127	21,981	10,996	10,985	9,928	4,912	5,016	183,495	94,365	89,130
27	430,276	219,891	210,385	159,592	81,791	77,801	59,295	29,829	29,466	21,787	10,912	10,875	9,815	4,837	4,978	179,787	92,522	87,265
28	422,677	215,093	207,584	158,464	80,563	77,901	57,758	28,679	29,079	22,346	11,020	11,326	9,361	4,621	4,740	174,748	90,210	84,538
29	411,472	209,892	201,580	156,486	79,358	77,128	54,880	27,279	27,601	23,296	11,652	11,644	8,694	4,320	4,374	168,116	87,283	80,833
30	405,266	206,773	198,493	155,151	78,391	76,760	52,552	25,876	26,676	23,457	11,843	11,614	8,218	3,926	4,292	165,888	86,737	79,151
31	404,264	205,694	198,570	156,740	78,930	77,810	51,157	25,108	26,049	23,128	11,565	11,563	7,983	3,695	4,288	165,256	86,396	78,860
32	407,028	206,734	200,294	159,328	80,004	79,324	51,004	25,018	25,986	23,840	11,919	11,921	7,706	3,741	3,965	165,150	86,052	79,098
33	406,824	206,601	200,223	160,508	80,878	79,630	50,251	24,755	25,496	23,988	12,119	11,869	7,487	3,600	3,887	164,590	85,249	79,341
34	400,782	202,744	198,038	157,334	79,282	78,052	49,123	23,965	25,158	24,728	12,163	12,565	7,425	3,674	3,751	162,172	83,660	78,512
35	405,988	205,028	200,960	158,850	79,993	78,857	49,609	24,132	25,477	25,236	12,278	12,958	7,512	3,708	3,804	164,781	84,917	79,864
36	403,860	203,220	200,640	158,270	79,482	78,788	49,168	23,894	25,274	24,624	11,811	12,813	7,387	3,549	3,838	164,411	84,484	79,927
37	402,445	201,944	200,501	157,793	79,560	78,233	49,643	23,944	25,699	23,683	11,179	12,504	7,166	3,523	3,643	164,160	83,738	80,422
38	401,754	202,084	199,670	156,704	79,199	77,505	50,344	24,224	26,120	23,462	11,229	12,233	7,034	3,415	3,619	164,210	84,017	80,193
39	380,320	190,861	189,459	148,652	75,207	73,445	47,820	22,983	24,837	22,737	10,845	11,892	6,662	3,214	3,448	154,449	78,612	75,837
40	372,788	186,333	186,455	145,594	73,192	72,402	45,604	21,808	23,796	22,161	10,599	11,562	6,439	3,089	3,350	152,990	77,645	75,345
41	367,728	183,615	184,113	142,560	71,882	70,778	44,447	21,271	23,176	21,995	10,536	11,459	6,195	3,033	3,162	152,531	76,993	75,538
42	364,838	181,804	183,034	140,261	70,866	69,395	43,507	20,588	22,919	22,718	10,871	11,847	6,015	2,952	3,063	152,337	76,527	75,810
43	367,639	183,159	184,480	142,654	71,968	70,686	43,222	20,580	22,642	22,890	10,945	11,945	6,061	2,934	3,127	152,812	76,732	76,080
44	359,710	178,110	181,600	140,268	70,434	69,834	43,107	20,509	22,598	22,893	10,973	11,920	5,729	2,691	3,038	147,713	73,503	74,210
45	361,677	179,050	182,627	142,870	71,998	70,872	44,055	20,809	23,246	23,068	11,083	11,985	5,693	2,698	2,995	145,991	72,462	73,529

**PLAINTIFF'S  
EXHIBIT  
10**

AGE	TOTAL			NH WHITE			NH BLACK			NH ASIAN			NH OTHER			HISPANIC		
	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL	MALE	FEMALE
46	370,253	183,080	187,173	152,589	76,897	75,692	44,875	21,296	23,579	22,639	10,796	11,843	5,790	2,756	3,034	144,360	71,335	73,025
47	379,859	187,873	191,986	164,286	82,687	81,599	46,205	21,882	24,323	22,208	10,683	11,525	5,964	2,850	3,114	141,196	69,771	71,425
48	376,625	186,551	190,074	165,407	83,213	82,194	44,735	21,158	23,577	21,522	10,279	11,243	5,817	2,780	3,037	139,144	69,121	70,023
49	355,001	176,360	178,641	157,222	79,012	78,210	41,586	19,867	21,719	20,379	9,861	10,518	5,298	2,574	2,724	130,516	65,046	65,470
50	341,271	169,389	171,882	150,663	75,893	74,770	41,136	19,659	21,477	18,772	9,147	9,625	5,001	2,332	2,669	125,699	62,358	63,341
51	334,602	166,147	168,455	149,873	75,434	74,439	41,030	19,549	21,481	17,364	8,453	8,911	4,811	2,274	2,537	121,524	60,437	61,087
52	335,613	166,590	169,023	151,895	75,872	76,023	41,979	19,901	22,078	17,141	8,420	8,721	4,770	2,300	2,470	119,828	60,097	59,731
53	349,456	172,633	176,823	163,650	81,451	82,199	43,796	20,571	23,225	16,946	8,274	8,672	5,047	2,421	2,626	120,017	59,916	60,101
54	352,489	173,819	178,670	172,039	85,419	86,620	42,967	20,116	22,851	16,897	8,254	8,643	5,177	2,524	2,653	115,409	57,506	57,903
55	352,438	173,341	179,097	176,400	87,332	89,068	42,309	19,815	22,494	16,604	8,095	8,509	5,241	2,546	2,695	111,884	55,553	56,331
56	348,168	170,980	177,188	178,830	88,334	90,496	41,737	19,514	22,223	15,026	7,328	7,698	5,145	2,424	2,721	107,430	53,380	54,050
57	347,481	169,943	177,538	181,416	89,466	91,950	41,735	19,457	22,278	14,713	7,022	7,691	5,121	2,432	2,689	104,496	51,566	52,930
58	347,405	170,462	176,943	183,932	90,855	93,077	41,510	19,545	21,965	14,587	6,821	7,766	4,996	2,478	2,518	102,380	50,763	51,617
59	333,016	162,569	170,447	179,453	88,445	91,008	39,894	18,582	21,312	13,894	6,425	7,469	4,652	2,272	2,380	95,123	46,845	48,278
60	327,715	159,198	168,517	179,732	88,281	91,451	38,512	17,800	20,712	13,488	6,262	7,226	4,713	2,332	2,381	91,270	44,523	46,747
61	318,910	153,887	165,023	176,464	86,198	90,266	37,257	17,125	20,132	13,318	6,102	7,216	4,599	2,216	2,383	87,272	42,246	45,026
62	308,338	148,297	160,041	171,591	83,366	88,225	35,839	16,523	19,316	13,084	6,017	7,067	4,392	2,163	2,229	83,432	40,228	43,204
63	300,583	144,031	156,552	169,968	82,462	87,506	34,225	15,637	18,588	12,655	5,829	6,826	4,208	2,033	2,175	79,527	38,070	41,457
64	284,202	135,045	149,157	163,767	78,776	84,991	31,113	13,976	17,137	11,846	5,415	6,431	3,908	1,915	1,993	73,568	34,963	38,605
65	272,265	129,117	143,148	158,686	76,319	82,367	29,186	13,061	16,125	11,753	5,324	6,429	3,677	1,737	1,940	68,963	32,676	36,287
66	257,838	121,769	136,069	152,460	73,151	79,309	27,481	12,102	15,379	10,711	4,752	5,959	3,486	1,680	1,806	63,700	30,084	33,616
67	244,864	115,090	129,774	143,651	68,665	74,986	26,307	11,504	14,803	10,391	4,562	5,829	3,262	1,579	1,683	61,253	28,780	32,473
68	237,986	111,614	126,372	141,210	67,433	73,777	24,729	10,797	13,932	10,278	4,572	5,706	3,064	1,460	1,604	58,705	27,352	31,353
69	227,591	106,508	121,083	137,758	65,558	72,200	23,023	10,016	13,007	9,321	4,216	5,105	2,948	1,407	1,541	54,541	25,311	29,230
70	224,531	105,119	119,412	140,320	66,806	73,514	21,388	9,388	12,000	8,401	3,777	4,624	2,836	1,374	1,462	51,586	23,774	27,812
71	218,150	101,962	116,188	140,443	66,873	73,570	19,154	8,338	10,816	7,530	3,368	4,162	2,762	1,319	1,443	48,261	22,064	26,197
72	179,023	83,171	95,852	111,556	52,993	58,563	16,075	6,844	9,231	6,501	2,992	3,509	2,187	1,040	1,147	42,704	19,302	23,402
73	166,683	76,623	90,060	104,255	48,884	55,371	14,939	6,223	8,716	6,041	2,796	3,245	1,986	919	1,067	39,462	17,801	21,661
74	161,406	73,665	87,741	104,324	48,656	55,668	13,790	5,671	8,119	5,382	2,474	2,908	1,874	874	1,000	36,036	15,990	20,046
75	152,633	69,411	83,222	100,119	46,540	53,579	12,920	5,377	7,543	5,022	2,350	2,672	1,751	822	929	32,821	14,322	18,499
76	136,808	61,840	74,968	89,667	41,513	48,154	11,580	4,725	6,855	4,591	2,144	2,447	1,579	746	833	29,391	12,712	16,679
77	124,525	55,463	69,062	81,192	37,030	44,162	10,620	4,202	6,418	4,192	1,968	2,224	1,363	618	745	27,158	11,645	15,513
78	113,938	50,356	63,582	73,849	33,348	40,501	9,671	3,762	5,909	3,862	1,814	2,048	1,239	538	701	25,317	10,894	14,423
79	104,725	45,936	58,789	68,629	30,807	37,822	8,544	3,382	5,162	3,480	1,612	1,868	1,090	471	619	22,982	9,664	13,318
80	97,404	42,130	55,274	63,924	28,346	35,578	7,808	2,984	4,824	3,138	1,474	1,664	1,024	444	580	21,510	8,882	12,628
81	88,660	37,817	50,843	57,941	25,414	32,527	7,209	2,647	4,562	2,835	1,282	1,553	915	394	521	19,760	8,080	11,680
82	82,509	34,549	47,960	54,170	23,403	30,767	6,565	2,357	4,208	2,537	1,097	1,440	860	357	503	18,377	7,335	11,042
83	77,098	31,918	45,180	50,903	21,615	29,288	6,182	2,215	3,967	2,192	993	1,199	728	292	436	17,093	6,803	10,290
84	68,027	27,724	40,303	45,066	18,805	26,261	5,504	1,937	3,567	1,921	838	1,083	608	259	349	14,928	5,885	9,043
85	61,291	24,396	36,895	41,000	16,780	24,220	4,997	1,680	3,317	1,726	728	998	556	219	337	13,012	4,989	8,023
86	55,636	21,907	33,729	37,526	15,151	22,375	4,226	1,414	2,812	1,450	595	855	511	197	314	11,923	4,550	7,373
87	50,532	19,467	31,065	34,213	13,482	20,731	3,729	1,217	2,512	1,347	533	814	465	180	285	10,778	4,055	6,723
88	45,349	16,916	28,433	30,550	11,639	18,911	3,430	1,082	2,348	1,179	470	709	411	143	268	9,779	3,582	6,197
89	38,467	13,986	24,481	26,089	9,673	16,416	2,927	880	2,047	904	362	542	341	124	217	8,206	2,947	5,259
90	32,469	11,418	21,051	22,026	7,861	14,165	2,448	716	1,732	750	288	462	294	110	184	6,951	2,443	4,508
91	27,366	9,318	18,048	18,626	6,385	12,241	2,057	583	1,474	645	226	419	209	56	153	5,829	2,068	3,761
92	22,652	7,384	15,268	15,464	5,075	10,389	1,750	463	1,287	515	180	335	167	32	135	4,756	1,634	3,122
93	18,403	5,750	12,653	12,528	3,908	8,620	1,489	399	1,090	393	141	252	149	28	121	3,844	1,274	2,570
94	14,237	4,315	9,922	9,688	2,867	6,821	1,172	308	864	298	111	187	119	22	97	2,960	1,007	1,953
95+	34,241	9,432	24,809	22,386	5,883	16,503	3,358	805	2,553	805	290	515	275	48	227	7,417	2,406	5,011

## Texas COVID-19 Demographics

<b>Age Groupings</b>	<b>Number</b>	<b>%</b>
<1 year	192	0.3%
1-9 years	915	1.7%
10-19 years	2387	4.3%
20-29 years	10689	19.3%
30-39 years	11740	21.2%
40-49 years	10611	19.2%
50-59 years	9282	16.8%
60-64 years	3436	6.2%
65-69 years	2338	4.2%
70-74 years	1389	2.5%
75-79 years	902	1.6%
80+ years	1432	2.6%
Pending DOB	19	0.0%
<b>Total</b>	<b>55332</b>	<b>100%</b>

## Cases by Age Group

## Texas COVID-19 Demographics

<b>Gender</b>	<b>Number</b>	<b>%</b>
Female	19109	34.5%
Male	35346	63.9%
Unknown	877	1.6%
<b>Total</b>	<b>55332</b>	<b>100%</b>

Cases by Gender

## Texas COVID-19 Demographics

<b>Race/Ethnicity</b>	<b>Number</b>	<b>%</b>
Asian	815	1.5%
Black	9193	16.6%
Hispanic	21901	39.6%
Other	250	0.5%
White	16675	30.1%
Unknown	6498	11.7%
<b>Total</b>	<b>55332</b>	<b>100%</b>

Cases by Race Ethnicity

## Texas COVID-19 Demographics

<b>Age Groupings</b>	<b>Number</b>	<b>%</b>
<1 year	3	0.0%
1-9 years	6	0.0%
10-19 years	18	0.1%
20-29 years	105	0.6%
30-39 years	303	1.8%
40-49 years	922	5.6%
50-59 years	2018	12.3%
60-64 years	1563	9.5%
65-69 years	1926	11.7%
70-74 years	2145	13.1%
75-79 years	2030	12.4%
80+ years	5393	32.8%
Unknown	0	0.0%
<b>Grand Total</b>	<b>16432</b>	<b>100%</b>

## Fatalities by Age Group



## Texas COVID-19 Demographics

Gender	Number	%
Female	6877	41.9%
Male	9555	58.1%
Unknown	0	0.0%
<b>Total</b>	<b>16432</b>	<b>100.0%</b>

## Fatalities by Gender

### Texas COVID-19 Demographics

<b>Race/Ethnicity</b>	<b>Number</b>	<b>%</b>
Asian	304	1.9%
Black	1824	11.1%
Hispanic	9219	56.1%
Other	91	0.6%
White	4984	30.3%
Unknown	10	0.1%
<b>Total</b>	<b>16432</b>	<b>100.0%</b>

### Fatalities by Race-Ethnicity



## Key Indicators For Staging

For more information, go to [www.austintexas.gov/covid19](http://www.austintexas.gov/covid19) (mobile link)

Data Last Refreshed: 10/13/2020 Data is updated once per day

Austin-Travis County COVID-19 case numbers will be delayed today, October 13. Austin Public Health staff is working through an issue caused by external laboratory submissions and will update data once this issue is resolved.

### New Admissions

(Austin MSA)

7 Day Moving Average

14

New Admissions

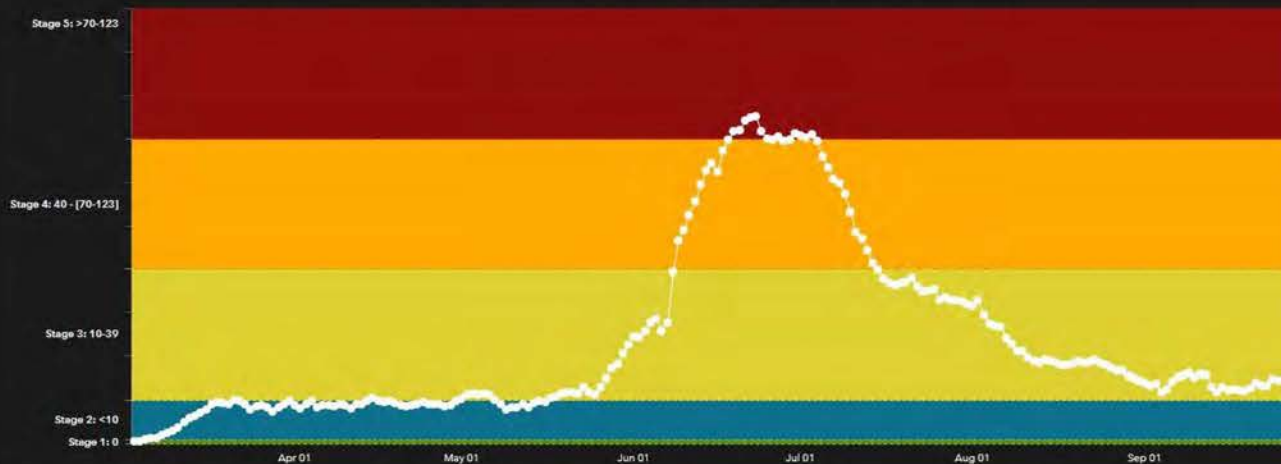
16

Overall Weekly Austin-Travis County COVID-19 Positivity Rate

4

Week ending 10/3/2020

### COVID-19: Risk-Based Guidelines with 7 Day Moving Averages for New Admissions (Austin MSA)



Stage Tracker

Percent Positive by Race/Ethnicity

New Cases / New Hosp. with 7 day Mov Avg.

ICU and Ventilator use with 7 day Mov avg.

Detailed Description

New Confirmed Cases  
(Austin/Travis County)  
(As of 10/12/2020)

7 Day Moving Average

77

New Cases Today

133

Doubling Time

327

Days (7 Day Average)  
(As of 10/12/2020)

### 7 Day Moving Average of Current Hospitalizations

Hospitalized

85

In ICU

29

On Ventilator

19



COVID-19 - As recommended precautions continue to increase for COVID-19, the James E. Rudder Building will be closed to visitors and customers beginning Wednesday, March 18, 2020. The Office of the Secretary of State is committed to continuing to provide services to ensure business and public filings remain available 24/7 through our online business service, [SOSDirect](#) or use the new [SOSUpload](#). Thank you in advance for your patience during this difficult time. [Information on Testing Sites is now available.](#)

NOTICE Bulk orders for Business Entity data files are not available at this time due to system update and maintenance issues. [Technical notice details](#)

Note - Navigational menus along with other non-content related elements have been removed for your convenience. Thank you for visiting us online.

## Election Advisory No. 2020-14

**To:** Election Officials

**From:** Keith Ingram, Director of Elections

A blue ink signature of Keith Ingram, the Director of Elections.

**Date:** April 6, 2020

**RE:** COVID-19 (Coronavirus) Voting and Election Procedures

The purpose of this advisory is to assist election officials in facilitating voting for individuals that may be affected by COVID-19, and in preparing for the conduct of elections in the context of this public health issue.

### Voter Registration Procedures

Stay-at-home orders and office closures in your jurisdiction may impact voters seeking to obtain voter registration applications. There are several existing options that you should encourage voters to utilize:

- **In-County Updates via [Texas Online](#):** If a voter has moved within the same county, the voter may update their address online at [www.Texas.gov](http://www.Texas.gov). Voters that are active or in suspense can update their name and/or residence address through this secure website.
- **Printed Voter Registration Applications:** If a voter has access to a printer, the voter can use the [SOS Informal Online Application](#) to complete a voter registration application. This application can be printed and mailed to the applicable county voter registrar. When the voter selects their county of residence, it will preprint the county voter registrar's address on the form so that when the voter mails it, they send it directly to their county voter registrar.
- **Postage-Paid Voter Registration Applications:** If a voter does not have access to a printer, the voter can request that a blank postage-paid voter registration application be mailed directly to the voter. The voter can fill out the [request form](#) on the SOS website. Counties can also mail blank applications to voters upon request.
- **Revisions to Voter Registration Certificate:** If a voter has their current voter registration certificate, they may make any necessary corrections or updates to the certificate, sign it and return it to the voter registrar.
- **[Register2Vote.org](#):** This is a third-party website that provides a remote printing option for voters. Voters can complete a form online and have a pre-filled application sent to them for completion. The voter must complete the form, sign it, and mail it in the included postage-paid envelope. This form is sent directly to the county voter registrar.

### Voting Procedures Authorized under the Texas Election Code

Below we have described some of the procedures that are authorized under Texas law that may be of assistance to voters that are affected by a recent sickness or a physical disability.

#### Voting by Mail

In Texas, in order to vote by mail, a voter must have a qualifying reason. A voter may vote early by mail if they:

- will be away from their county on Election Day and during early voting;
- are sick or disabled;
- are 65 years of age or older on Election Day; or
- are confined in jail, but eligible to vote.

One of the grounds for voting by mail is disability. The Election Code defines "disability" to include "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." (Sec. 82.002). If a voter believes they meet this definition, they can submit an application for ballot by mail.

- [Application for a Ballot by Mail \(PDF\)](#).

#### Chapter 102, Late Voting Due to Recent Sickness or Physical Disability

The Election Code authorizes late voting if a voter becomes sick or disabled on or after the day before the last day for submitting an application for a ballot to be voted by mail, and is unable to go to the polling place on Election Day. The voter must designate a representative to submit an application on the voter's behalf in

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13**

person to the early voting clerk. The application must be received before 5:00 p.m. on Election Day. The application is reviewed and the early voting clerk verifies the applicant's registration status in the same manner as early voting by mail. The early voting clerk must provide the same balloting materials that are used for early voting by mail to the representative who will deliver them to the voter. The voter should mark and seal the ballot in the same manner as voting by mail **including signing** the back flap of the carrier envelope. The ballot must be returned in its carrier envelope to the early voting clerk before 7:00 p.m. on Election Day **by the same representative** who delivered the ballot to the voter.

- [Application for Emergency Early Voting Ballot Due to Sickness or Physical Disability \(PDF\)](#)
- [Instructions for Voter to include with Balloting Materials \(PDF\)](#)

#### Chapter 104, Voting at Main Early Voting Location

The Election Code authorizes voters who are sick or disabled to vote on Election Day at the main early voting place, so long as voting machines of some type are used in the voter's precinct and the voter's sickness or disability prevents the voter from voting in the regular manner without personal assistance or likelihood of injury. For this procedure, the voter must complete and submit the applicable affidavit to be provided with the balloting materials used for early voting by mail. The voter must mark and seal the ballot in the same manner as in early voting by mail, except that the certificate on the carrier envelope need not be completed. After sealing the carrier envelope, the voter must give it to the clerk at the main early voting polling place between the hours of 7:00 a.m. and 7:00 p.m. The Early Voting Clerk must note on the envelope that the ballot was voted under Chapter 104.

- [Affidavit for Voting at Early Voting Place on Election Day \(PDF\)](#)

#### Curbside Voting

If a voter is physically unable to enter the polling place without assistance or likelihood of injury to his or her health, the voter is eligible for entrance or curbside voting. (Sec. 64.009). This option must be made available at all polling locations. To provide for voting curbside, the voter must be qualified by the election officer before the voter can receive the ballot. An election officer may deliver a ballot or a DRE voting machine to the voter at the entrance or curb of the polling place. Poll watchers and inspectors must be allowed to accompany the election officer. Once the voter has marked his or her ballot, the election officer deposits the ballot for the voter. On the voter's request, a person accompanying the voter to the polling place must be permitted to select the voter's ballot and to deposit the ballot in the ballot box after the voter has voted. If the voter is not only physically unable to enter the polling place, but is also eligible for voter assistance in marking his or her ballot, they may receive assistance in marking and completing their ballot in accordance with Chapter 64, Subchapter B of the Election Code. Either two election officers may assist the voter or the voter may be given assistance by a person of the voter's choice, other than the voter's employer, an agent of that employer or an officer or agent of the voter's labor union. For voters that are voting at the curbside, **instruct polling place workers to allow the curbside voter the same privacy as a voter in the voting booth**. We anticipate providing further guidance regarding curbside voting in the coming weeks.

#### Potential Court Order to Address Quarantined Voters

Voting in-person during early voting or on Election Day may not be an available option for all voters, including those affected by quarantines. Political subdivisions may need to act quickly to address the rapidly changing public health situation. In monitoring your situations locally, it is important to note that you may have a need to modify certain voting procedures. In these circumstances, you may want to consider seeking a court order to authorize exceptions to the voting procedures outlined in certain chapters of the Texas Election Code for these voters. The following are possible considerations:

1. **Expanding Eligibility Requirements Under Chapter 102 (Late Voting for Sickness or Physical Disability):** A court order could provide for a temporary expansion of the eligibility requirements for Chapter 102 voting to allow voters in quarantine to vote in this fashion. This option would also require the court, in some instances, to temporarily waive or modify the requirement for a physician's signature on the application for this type of late ballot for purposes of any election(s) impacted by COVID-19.
2. **Other Modifications to Voting Procedures:** A court order could provide for modifications to other voting procedures as necessary to address the impact of COVID-19 within the jurisdiction. For example, in 2014, Dallas County obtained a court order authorizing modified voting procedures for individuals affected by the Ebola quarantine, modeled on the procedures outlined in Section 105.004 of the Texas Election Code for certain military voters in hostile fire pay zones.

**If your county obtains a court order allowing modifications to voting procedures to address COVID-19, please send a copy of the court order to the Secretary of State's Office.**

#### Other Considerations Related to COVID-19 or Other Illnesses

If your political subdivision is affected by a stay-at-home order, quarantine or outbreak of COVID-19 or any other type of illness, the conduct of your elections could be impacted. In order to protect the health and safety of election workers, below are some considerations:

- **Cleaning and Sanitizing Voting System Equipment:**
  - **Voting System and e-Pollbook Equipment:** Please check with your vendor about the specific procedures you should follow to clean and sanitize any equipment that is handled by voters or polling place workers. We received specific information from the following vendors about proper techniques for cleaning equipment:
    - **Hart Intercivic Voting System Equipment:** Users may wipe Hart equipment with 50% or higher clear, fragrance-free, isopropyl alcohol solution and a lint-free wipe. Do not use ammonia or detergent-based solutions as these may be harmful to the screen or the plastics surrounding the display. To avoid spotting, make certain that equipment screens are wiped dry (do not leave puddles).
    - **ES&S Voting System Equipment:** You can use a soft, lint-free cloth and isopropyl alcohol to clean the touchscreen of the voting machine. Do not spray directly on the touch screen. Only lightly dampen the cloth, do not soak it. Do not use any harsh cleaning products on the screen as this may damage the touch screen. Do not allow any liquid cleaner to come in contact with ballot stock.
- **Cleaning and Sanitizing Polling Places:** The Centers for Disease Control and Prevention (CDC) has issued [recommendations](#) for preventing the spread of coronavirus specifically in election polling locations. Here are a few of their specific suggestions:
  - **Encourage workers to wash hands frequently:** wash hands often with soap and water for at least 20 seconds. If soap and water are not readily available, use an alcohol-based hand sanitizer that contains at least 60% alcohol.

- **Practice routine cleaning of frequently touched surfaces with household cleaning spray or wipe:** including tables, doorknobs, light switches, handles, desks, toilets, faucets, sinks, etc.
- **Disinfect surfaces that may be contaminated with germs after cleaning:** A list of products with EPA-approved emerging viral pathogens claims is available on the [EPA's website](#). Products with EPA-approved emerging viral pathogens claims are expected to be effective against the virus that causes COVID-19 based on data for harder to kill viruses. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, use of personal protective equipment).
- **Arrangement of Polling Places:** It is imperative that you review your procedures related to setting up your polling place. Voting stations should be set up in a way that adheres to the suggested social and physical distance guidelines and allow for at least 6 feet between voters. Additionally, you should review your check-in stations to ensure you are providing adequate space between voters. This may include providing your workers with tape to mark off spacing guidelines on the floor of the polling place.
- **Election Judges and Clerks:**
  - **Training and Recruiting of Election Workers:**
  - **Recruitment of Election Workers:** We recommend that you make efforts to recruit and train additional workers beyond what you project to need for a given election. This will ensure that you have adequate back up workers to assist in the event that you have election workers that are unavailable at the last minute.
    - **Recruiting from Current Workers:** With regard to recruiting workers, you may want to ask your current appointed judges to provide recommendations of other individuals that can serve. Additionally, you may have different judges and clerks depending on the type of election you hold. We suggest you reach out to your entire pool of potential workers to determine availability for 2020 election dates.
    - **Student Election Clerks:** You may also want to consider enlisting [student election clerks](#) in your pool of available workers. For elections occurring outside of the school year, the student clerks would not need to obtain permission from their high school principal provided they obtained permission from their parent or legal guardian.
  - **Training of Election Workers:** In order to train a larger pool of workers, you may want to consider allowing your election workers to utilize the Secretary of State's online Poll Worker Training. This training is focused on the legal procedures related to acceptance of voters and the voting process. Any procedures that are specific to your county would need to be provided through additional training or supplemental materials.
  - **Unavailability of Judges:** If both the presiding judge and alternate judge are unavailable to serve and this is discovered after the 20th day before election day, the presiding officer of the appointing authority, or if the presiding officer is unavailable, the authority responsible for distributing supplies for the election, shall appoint a replacement judge. (Sec. 32.007). Additionally, if the authority is unable to find an election judge who is a qualified voter of the specific precinct needing a judge, the authority may appoint individuals that meet the eligibility requirements of an election clerk which encompasses a broader territory. (Sec 32.051(b)).

Type of Election	Presiding Officer of Appointing Authority	Authority responsible for Delivering Supplies
Primary Election	County Chair of Political Party	County Chair of Political Party
Joint Primary	County Election Officer	County Election Officer
General Election for State and County Officers or County Ordered Election	County Judge	County Election Officer
Cities	Mayor	City Secretary
Other Political Subdivision Elections	Presiding Officer of Governing Body of Political Subdivision	Secretary of Governing Body; if no secretary, the presiding officer of governing body

- **Polling Locations:**
  - **Review List of Locations:** We recommend reviewing your list of current polling locations to determine if you should consider proactively relocating them. For example, if you are currently using assisted living facilities or residential care facilities that have residents that would be in one of the higher-risk categories, relocating the polling place may be in the best interest of the individuals at that location. Please be advised that if you choose to relocate a polling place in a facility like this, we strongly recommend that you provide information to the residents about voting by mail to ensure that they are still able to vote in upcoming elections without the difficulty of leaving the facility to travel to a different polling place. Additionally, you should be monitoring your current polling places to determine if any of those locations have been closed as a result of business or government building closures.
  - **Unavailable Locations:** If polling locations become unavailable, you may need to relocate your polling location or combine and consolidate that location with another polling place in close proximity to it. To the extent possible, any changes to polling locations must be made in accordance with Chapters 42 and 43 of the Texas Election Code. If you are in a situation where you will have difficulty complying with these chapters, please contact the Secretary of State's office to discuss other available options.
    - **Notice of Changes to Polling Locations:** Please be advised that if you have a polling location change, you must post [notice \(PDF\)](#) of that change at the location that is no longer being used. Any websites that contain polling locations should be updated. For certain county-run elections, polling place information must also be updated with the Secretary of State's office, if applicable.
    - **Website Notices:** At this time, you may want to consider posting a notice on your website instructing voters to check your website for updates and changes to polling locations prior to early voting and election day. This will help ensure that voters are always getting updated and accurate information.
- **Voting by Mail Considerations:** At this time, the CDC has not provided any special recommendations or precautions for the storage of ballots. However, it is recommended that workers handling mail ballots practice [hand hygiene](#) frequently. Please continue to stay updated on the CDC's website as they provide additional recommendations regarding the handling of mail and other topics.
  - **Additional Ballot by Mail Supplies:** Because there may be a higher volume of ballot by mail requests in 2020, we strongly recommend that you review your current supply of applications, balloting materials, and ballot stock for future elections. It is important you have the necessary supply on hand to meet increased requests you may receive.
- **Election Office Hours:** Election officials are required to maintain certain office hours related to their election duties for a prescribed number of days before and after an election. If your office is closed for public health reasons or you are unable to be at your office during the mandatory office hour time frame, we advise that entities post information on how to get in contact with the applicable officials for election related information. This may include posting phone

numbers, an email address that can receive public inquiries, or even a mailing address that can receive written requests for information. We recommend that you assign someone to periodically check for voicemails, emails, or mail related to your election.

- **Voter Registration Office Hours:** Section 12.004(c) requires the voter registrar's office to be open while the polls are open on the date of any election held in the county on a uniform election date. If you have entities that will be holding an election on May 2, 2020, you must satisfy this requirement. However, we believe that as long as you can provide answers to voter registration questions remotely and you notify your entities about how to reach you, you do not need to be physically in the office. You must also be able to provide all of the same voter registration services you would otherwise provide to your local political subdivisions if you were in the office.
- **Volunteer Deputy Registrars (VDR):** You still have a legal obligation to process volunteer deputy registrar applications. If you must suspend volunteer deputy registrar classes, we strongly advise that you adopt the SOS online Volunteer Deputy Registrar training and in-person examination option. This would allow you to schedule the examinations based on need or desire by VDRs and would allow you to temporarily reduce or cancel in-person training as dictated by your county's circumstances. For more information about adopting the online training and examination, please see [Advisory 2019-04](#). Additionally, you still have an obligation to receive voter registration applications from VDRs. To eliminate person-to-person contact, you could provide drop boxes for voter registration applications. These drop boxes should be located in close proximity to your main office or connected to it. They should be secured and checked regularly.
- **Cybersecurity Impacts:** If your political subdivision is affected by a widespread quarantine or outbreak of COVID-19 or any other type of illness, your office staff might be mandated to work remotely. In addition, the volume of voters that will start to utilize your internet-based resources will increase. During a crisis situation, bad actors may try to capitalize on the circumstances to take actions that could compromise the security of your elections office. Please remain vigilant about following best practices related to cybersecurity and election security.
  - **Service Interruption:** Networks are normally built to sustain high volume traffic, but the magnitude of the COVID-19 crisis presents an increased risk that systems may become compromised. An abnormal increase in network traffic could be misinterpreted as a DOS (Denial of Service) attack which could shut down networks depending on the type of security implementation.
  - **Ransomware:** Cybercriminals can infect the computers of government agencies before demanding that they pay a ransom for an encryption key that will free their locked files and records. Ransomware can lock up databases preventing polling places from verifying eligibility and confirming that voters are in the right districts/precincts.
  - **Election Systems and e-Pollbook Equipment:** As mentioned above, databases are susceptible because they must have a constant network connectivity. When relocating polling places, it is very important to ensure that the systems are connected to a secure and reliable network.
  - **Voter Registration Scams:** Voter registration procedures are not conducted over the phone or the internet other than the previously mentioned authorized channels. Be aware of scams that are targeted to steal personally identifiable information from voters and/or election workers. It is especially important not to provide personal information of voters or election workers over the phone if your office is solicited in this manner.
- **Communications Plan:** You should develop a plan for communicating to voters and election workers when any changes occur that may impact them. The communications plan should involve updating your official website with specific details. Any use of social media should direct people back to your official website to ensure that only official, accurate, and authorized information is being disseminated to the public. We suggest you develop a plan for working with local media to keep the public informed. Finally, any major changes that affect the election process in your county should be communicated to the Secretary of State's office.

## Additional Resources

Here are a list of additional resources that may be helpful to you.

- [Election Assistance Commission - Coronavirus \(COVID-19\) Resources](#)
- [Centers for Disease Control and Prevention \(CDC\) – Recommendations for Election Polling Locations](#)
- [Texas Department of State Health Services – Coronavirus Disease 2019 \(COVID-19\)](#)

If you have any questions regarding this advisory, please contact the Elections Division at 1-800-252-2216.

KI:CA

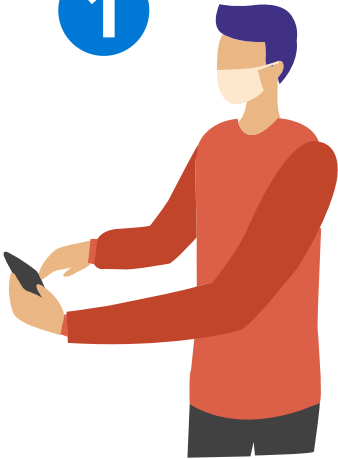


# Check your eligibility for a COVID-19 test- for FREE

1

## Register online at [AustinTexas.gov/COVID19](https://austintexas.gov/COVID19)

You can sign up by phone or computer.



2

## Take an Assessment

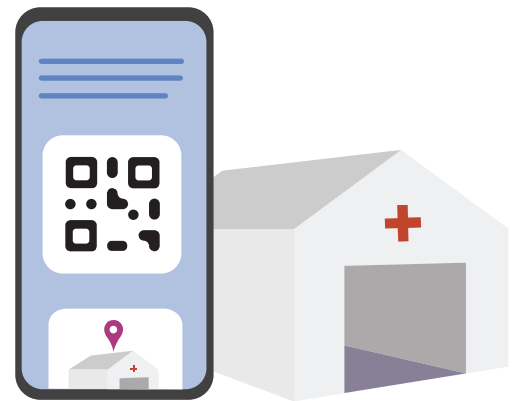
Answer a few questions to see if you are eligible for a test.



3

## Schedule an Appointment and Get Tested

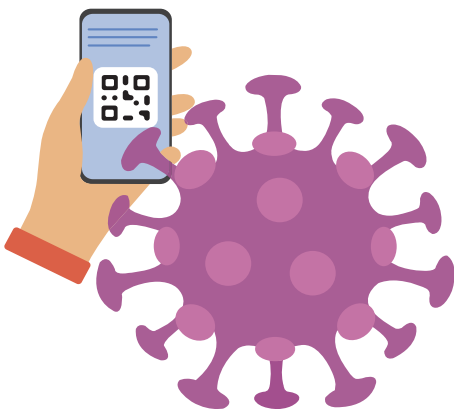
If you are eligible, you can sign up for testing at a drive-through location. You will receive confirmation of your appointment. Go to your appointment to be tested for COVID-19.



4

## Get Results Online

Your results will be available online in 3-4 days.



**PLAINTIFF'S  
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[AustinTexas.gov/COVID19](https://austintexas.gov/COVID19)

Call Austin 3-1-1 for more information



No. D-1-GN-20-001610

TEXAS DEMOCRATIC PARTY, et al.,  
Plaintiffs

IN THE DISTRICT COURT

and

ZACHARY PRICE, LEAGUE OF  
WOMEN VOTERS OF TEXAS,  
LEAGUE OF WOMEN VOTERS  
OF AUSTIN-AREA, MOVE TEXAS  
ACTION FUND,  
WORKERS DEFENSE  
ACTION FUND,  
Intervenors/Plaintiffs

v.

TRAVIS COUNTY, TEXAS

DANA DEBEAUVOIR IN HER  
CAPACITY AS TRAVIS COUNTY  
CLERK,  
Defendant

and

STATE OF TEXAS,  
Intervenor/Defendant

201<sup>st</sup> JUDICIAL DISTRICT

**ORDER MODIFYING CERTAIN EARLY VOTING PROCEDURES**

On April 15, 2020, the Court considered Travis County Clerk Dana DeBeauvoir's Counter-Petition to Modify Certain Early Voting Procedures. All parties were present and appeared through counsel of record. Having considered the pleadings, the evidence, the arguments of counsel, and the relevant law, this Court is of the opinion that the early voting periods for the special election for State Senate District No. 14 scheduled for July 14, 2020, and the primary runoff elections for candidates for the Texas Democratic Party and the Republican Party of Texas, also scheduled for Tuesday, July 14, 2020, should be aligned.

WHEREAS, on March 13, 2020, the Governor of Texas certified that the novel

coronavirus (COVID- 19) poses an imminent threat of disaster and, under the authority vested in the Governor by Section 418.014 of the Texas Government Code, declared a state of disaster for all counties in Texas; and

WHEREAS, the Commissioner of the Texas Department of State Health Services has determined that, as of March 19, 2020, COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, also on March 19, 2020 and March 31, 2020, the Governor issued executive orders in accordance with the President's Coronavirus Guidelines for America, as promulgated by President Donald Trump and the Centers for Disease Control and Prevention, and mandated certain obligations for Texans that are recommended by federal guidelines and aimed at slowing the spread of COVID-19, and additional guidance to the public has recommended use of face coverings in public settings while maintaining social distancing; and

WHEREAS, on March 16, 2020, the Governor ordered the special election for Texas State Senate District No. 14 to be held on Tuesday, July 14, 2020, for the purpose of electing a state senator to serve out the unexpired term of the Honorable Kirk Watson and indicated early voting by personal appearance in the special election for the State Senate District No. 14 should begin on Monday, June 29, 2020, in accordance with Sections 85.001(a) and (c) of the Texas Election Code; and

WHEREAS, on March 20, 2020, the Governor issued a proclamation postponing the Texas Democratic Party and Republican Party of Texas' primary runoff elections date to July 14, 2020, with early voting by personal appearance to begin on July 6, 2020, in accordance with Section 85.001(b) of the Texas Election Code; and

WHEREAS, pursuant to Section 85.001(d) of the Texas Election Code, Dana DeBeauvoir, Travis County Clerk, has the authority to determine the earliest practicable date on which the early voting by personal appearance period shall begin if it is not possible to begin on the prescribed date; and

WHEREAS, Senate District No. 14 encompasses portions of Travis and Bastrop Counties and the election officials for each County agree that aligning the in-person early voting periods for the special election for State Senate District No. 14 and the primary runoff elections for candidates for the Texas Democratic Party and the Republican Party of Texas as set forth in this order is necessary; and

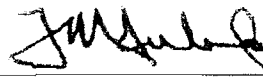
WHEREAS, the parties reasonably anticipate that due to COVID-19, the associated executive orders and public health guidance issued by local, state, and federal authorities, and the difficulties of safely establishing and staffing polling locations for voting by personal appearance for an extended period of time will not be possible; and

WHEREAS, conducting multiple elections in overlapping voting precincts with the same election date but divergent early voting by personal appearance periods would likely cause voter confusion and would further require that many voters appear in person twice in order to vote, unnecessarily increasing activities contrary to the goals of Stay at Home Orders issued by the Governor, the County Judge, and the Mayor of the City of Austin; and


WHEREAS, aligning the early voting periods for the State Senate District No. 14 election and the party's respective primary runoff elections will allow individuals the right to vote by personal appearance while minimizing the risk of exposure to and spread of COVID-19 among poll workers, poll watchers, voters, and the community, conserving resources, and reducing confusion to voters.

THEREFORE, the Court hereby ORDERS that, in accordance with Section 85.001(d) of the Texas Election Code, early voting by personal appearance in the special election for the State Senate District No. 14 shall begin on Monday, July 6, 2020, and run through Friday, July 10, 2020 so that it runs concurrently with the early voting period for the parties' respective primary runoff elections.

Signed on April 15, 2020.

  
\_\_\_\_\_  
THE HONORABLE TIM SULAK  
JUDGE PRESIDING

Agreed as to content and form:

  
Bryan Goertz  
Bastrop County Criminal District Attorney

No. D-1-GN-20-001610

TEXAS DEMOCRATIC PARTY, et al.,	§	IN THE DISTRICT COURT
Plaintiffs	§	
	§	
and	§	
	§	
ZACHARY PRICE, LEAGUE OF	§	
WOMEN VOTERS OF TEXAS,	§	
LEAGUE OF WOMEN VOTERS	§	
OF AUSTIN-AREA, MOVE TEXAS	§	
ACTION FUND,	§	
WORKERS DEFENSE	§	
ACTION FUND,	§	
Intervenors/Plaintiffs	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
DANA DEBEAUVOIR IN HER	§	
CAPACITY AS TRAVIS COUNTY	§	
CLERK,	§	
Defendant	§	
	§	
and	§	
	§	
STATE OF TEXAS,	§	
Intervenor/Defendant	§	201 <sup>st</sup> JUDICIAL DISTRICT

**DEFENDANT TRAVIS COUNTY CLERK DANA DEBEAUVOIR'S**  
**COUNTER-PETITION TO ALIGN EARLY VOTING PERIODS**

COMES NOW, Defendant Travis County Clerk, Dana DeBeauvoir ("DeBeauvoir") and files this Counter-Petition to Align Early Voting Periods, and would show as follows:

**I. SUMMARY**

In light of the unprecedented danger posed to our community and Travis County's registered voters, it is imperative to align the early voting periods of the Senate District 14 ("SD 14") race and the primary runoff elections for both the Republican and Democratic parties. Failure to align the early voting periods will not only cause voter confusion, but will also increase the risk of exposure to a highly infectious and dangerous disease – COVID-19. Specifically, the failure to

align the early voting periods will: (1) increase the number of days and hours that poll workers will be exposed to potentially infected individuals; (2) increase the number of election workers, employees, and poll workers necessary to conduct the elections; (3) increase the danger to voters because they will have longer wait times due to difficulty in filling poll worker positions; and (4) increase the exposure of voters to potentially infected individuals because voters who appear at an early voting location to vote during the first week of voting for the special election would be required to vote in person twice, able to obtain only a ballot for the special election on their first visit, and having to return a second time during the following week if they wished to vote in a primary runoff election.

## **II. PARTIES**

Counter-Plaintiff is Dana DeB940389

eauvoir, is the duly elected County Clerk of Travis County, Texas.

Counter-Defendant, Texas Democratic Party, is a Plaintiff herein, has made a general appearance in this matter, and may be served through their attorneys of record.

Counter-Defendant, Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party, is a Plaintiff herein, has made a general appearance in this matter, and may be served through his attorneys of record.

Counter-Defendant, Joseph Daniel Cascino, is a Plaintiff herein, has made a general appearance in this matter, and may be served through his attorneys of record.

Counter-Defendant, Shanda Marie Sansing, is a Plaintiff herein, has made a general appearance in this matter, and may be served through her attorneys of record.

Counter-Defendant, State of Texas, is an Intervenor-Defendant herein, has made a general appearance in this matter, and may be served through its attorneys of record.

Counter-Defendant, Zachary Price, is an Intervenor-Plaintiff herein, has made a general appearance in this matter, and may be served through his attorneys of record.

Counter-Defendant, League of Women Voters of Texas, is an Intervenor-Plaintiff herein, has made a general appearance in this matter, and may be served through its attorneys of record.

Counter, Defendant, League of Women Voters of Austin-Area, is an Intervenor-Plaintiff herein, has made a general appearance in this matter, and may be served through its attorneys of record.

Counter-Defendant, Move Texas Action Fund, is an Intervenor-Plaintiff herein, has made a general appearance in this matter, and may be served through its attorneys of record.

Counter-Defendant, Workers Defense Action Fund, is an Intervenor-Plaintiff herein, has made a general appearance in this matter, and may be served through its attorneys of record.

### **III. JURISDICTION AND VENUE**

This Court has jurisdiction over this matter under the Texas Election Code and venue is proper in this county because this matter concerns an election scheduled to occur in Travis County, Texas. Furthermore, the relief sought in this Counter-Petition concerns an election that is made the basis of declaratory relief requested by the Plaintiffs, Intervenor-Plaintiffs, and Intervenor-Defendants herein.

### **IV. STANDING**

Counter-Plaintiff DeBeauvoir is the duly elected County Clerk of Travis County, Texas. She is the official tasked with numerous statutory duties as an Early Voting Clerk under the Texas Election Code concerning three elections currently scheduled to occur on Tuesday, July 14, 2020, specifically: (1) the primary runoff election for the Texas Democratic Party's candidates; (2) the primary runoff election for the Republican Party of Texas' candidates; and (3) the special election called by Governor Abbott for Texas Senate District 14. *See, e.g.*, Tex. Elect. Code §§ 83.001

(early voting clerk shall conduct early voting in each election) & 83.002 (County Clerk is the early voting clerk for the county in primary elections and special elections called by the governor).

Pursuant to the Texas Election Code, DeBeauvoir in her official capacity as the Early Voting Clerk for the foregoing elections has the authority to determine the earliest practicable date on which early voting by personal appearance shall begin if it is not possible to begin on the prescribed date as set by the authority ordering the election. *Id.*, § 85.001(d). The parties to this litigation do not agree to align the early voting periods, and the Secretary of State advisories instructs clerks to obtain a Trial Court order. **Exhibit 1**, Secretary of State Election Advisory 2020-14.

For the reasons set forth herein, DeBeauvoir believes it is neither possible nor practicable to hold divergent early voting periods for the SD 14 Election and the parties' primary runoff elections. Accordingly, she seeks relief to align the early voting periods for these elections so that they will occur simultaneously.

## **V. NECESSITY FOR RELIEF**

Due to the unique and historically unprecedented circumstances presented by the ongoing COVID-19 pandemic, including evolving medical advice, and concomitant emergency proclamations issued by federal, state, and local government officials that residents must “shelter in place”, “stay at home”, or practice “social distancing” to prevent the rapid spread of COVID-19, a highly contagious virus with potentially fatal consequences, DeBeauvoir reasonably anticipates that there will be a shortage of election judges and poll workers available for the early voting periods associated with these July 14, 2020 elections, and that the typical arrangements for polling locations will need to be substantially modified in order to provide reasonable access to voters while complying with public health and safety requirements and recommendations.



DeBeauvoir anticipates the shortage of election judges because of her experience with the March 3, 2020 primary elections, which were conducted in the earlier phase of COVID-19. During those recent elections, there were significant issues with staffing.

Additionally, if the early voting periods are not changed, many voters who seek to vote in both the SD 14 Election and one of the parties' primary runoff elections could be required to appear at an early voting polling place on two separate occasions. Specifically, if these voters vote by personal appearance during the first week of early voting for the SD 14 Election, they would be required to return to an early voting polling place to vote in person during the following week in order to cast a ballot for candidates in either the Texas Democratic Party or Republican Party of Texas' primary runoff elections or come to a polling place on election day to cast a ballot in a primary runoff election. Although it is a concern that these divergent early voting periods are likely to cause confusion among voters, and they could be discouraged from returning to vote a second time, the biggest concern is the contradiction to current orders and CDC recommendations by having voters appearing twice to vote in the elections.

## **VI. BACKGROUND FACTS**

Governor Abbott has called a special election for SD 14 to occur on Tuesday, July 14, 2020, with early voting by personal appearance to begin on Monday, June 29, 2020. *See* Proclamation by the Governor of the State of Texas dated March 16, 2020 ("SD 14 Proclamation"), attached hereto as **Exhibit 2**. Under the Texas Election Code, in-person early voting for the SD 14 election will end on Friday, July 10, 2020.

Pursuant to the Texas Election Code, in-person early voting for the Texas Democratic Party primary runoff election and the Republican Party of Texas' primary runoff election will begin on

Monday, July 6, 2020, and will end on Friday, July 10, 2020. See **Exhibit 3** Secretary of State Election Advisory 2020-13.

The right to vote is “the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It is also expressly protected by the Constitution. U.S. Const. am. XIV § 2, XV, XVII, XIX, XXIV. During this public health crisis, “maximum safety” for all people, including election poll workers and voters, is to minimize contact with others, especially in view of shortages in personal protective equipment. See <http://www.austintexas.gov/departments/health>; and <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

Under these extraordinary circumstances, DeBeauvoir must conduct these three elections on July 14, 2020, including conducting early voting for all three elections, while taking steps to ensure the safety of poll workers and voters by complying with “social distancing” and other precautions. Pursuant to the CDC, people infected with COVID-19 may infect others prior to the onset of symptoms, and a single asymptomatic voter, election clerk, or poll worker could infect hundreds of others. See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

DeBeauvoir must also comply with emergency orders currently in place for Travis County and the City of Austin, which restrict public gatherings except for specific and limited activities. It appears increasingly likely that these orders will extend beyond their current period for weeks, if not months.<sup>1</sup>

Both Travis County’s and Governor Abbott’s efforts to stop the spread of COVID-19 are far-reaching because the virus presents a grave threat to public health, as reflected by events

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<sup>1</sup> Ryan O’Hare, *Coronavirus Pandemic Could Have Caused 40 Million Deaths If Left Unchecked*, <https://www.imperial.ac.uk/news/196496/coronavirus-pandemic-couldhavecaused-40/>.

unfolding in New York City, New Orleans, and around the world.<sup>2</sup> These measures include closing all but the most essential businesses and ordering residents to shelter-in-place. The Governor's Order has closed schools and universities throughout Texas until May 4, 2020, and many school districts have decided to close campuses and facilities for the remainder of their school years and throughout summer to help prevent the spread of COVID-19. These measures are necessary because this virus poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas. Currently, authorities expect a surge of COVID-19 cases in the coming weeks and months. Texas officials all across the state are trying to ensure that there will be adequate medical supplies, hospital capacity, and healthcare workers to prevent the system from collapsing, which would further endanger public health and safety. Avoiding collapse requires that everyone take actions to conserve PPE resources for use by healthcare workers.

Daily news reports contain dire warnings about the national shortage of PPE along with an increased need for it to deal with highly infectious patients. Many hospitals in Texas report that they are critically short on supplies. These types of warnings and various governmental limitations on the number of persons who may gather at any one location, combined with "shelter at home" orders to prevent the transmission of COVID -19 and "flatten the curve" and preserve medical resources, including conservation of medical-quality PPE to ensure healthcare workers' ability to effectively treat COVID -19 patients,<sup>3</sup> have substantially reduced the number of persons available and willing to act as poll workers. Almost universally, such persons – many of whom fall within

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<sup>2</sup> Mattia Ferraresi, *A Coronavirus Cautionary Tale From Italy: Don't Do What We Did*, (Boston Globe, Mar. 13, 2020), <https://www.bostonglobe.com/2020/03/13/opinion/coronavirus-cautionary-tale-italy-dont-do-what-we-did/>; Mirco Nacoti, et al, *At the Epicenter of the COVID-19 Pandemic and Humanitarian Crises in Italy: Changing Perspectives on Preparation and Mitigation*, NEJM Catalyst: Innovations in Care Delivery, Mar. 22, 2020), <https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080>.

<sup>3</sup> See Governor Abbott's Executive Order GA-09, dated March 22, 2020, attached hereto as **Exhibit 4**.

populations that are particularly vulnerable to more serious complications from a COVID-19 infection – have expressed concern about the lack of PPE available for their own use to prevent the unknowing transmission of COVID-19 by an asymptomatic person.

Additionally, the number of available polling locations has been significantly reduced as a result of changes in the way that many businesses are operating to comply with the various emergency orders and medical guidance. For example, many grocery stores that traditionally serve as early polling locations in Travis County have reduced their operating hours and have instituted procedures to limit the number of persons in their stores at any given time.

## **VII. REQUESTED ALIGNMENT OF EARLY VOTING PERIODS**

There is no question that stopping the spread of COVID -19, ensuring healthcare workers have sufficient PPE, and avoiding contact that would contribute to a spike in new cases is in the public's best interest at this time. Therefore, DeBeauvoir, in accordance with Section 85.001(d) and guidance contained in the most recent Election Advisories issued by the Texas Secretary of State concerning COVID-19, requests that this Court grant her immediate relief by ordering the alignment of the in-person early voting periods for the SD 14 Election and the parties' respective primary runoff elections, so that all early voting in person for these elections will occur between Monday, July 6, 2020 and Friday, July 10, 2020.

## **VIII. ARGUMENTS AND AUTHORITIES**

The foregoing relief, which is limited to the in person early voting period for the SD 14 Special Election, would facilitate, rather than interfere with, the elective process. *See Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999) (holding injunction that delays the election would be improper, but injunction that facilitates the elective process may be appropriate); *Ellis v. Vanderslice*, 486 S.W.2d 155, 159–60 (Tex. Civ. App.—Dallas 1972, no writ) (courts may act to

facilitate election process). Furthermore, DeBeauvoir, in her official capacity as the statutory early voting clerk, has determined that – due to the unprecedented circumstances facing election officials and the electorate in preparing for these three elections scheduled for July 14, 2020 – it would be both impossible and impracticable to conduct safe and fair elections unless the “in person” early voting periods for the SD 14 Election and the parties’ respective primary runoff elections are aligned so that they may occur simultaneously. DeBeauvoir believes that the earliest practicable date on which “in person” early voting for the SD 14 Election can occur is Monday, July 6, 2020. *See*, Tex. Elect. Code § 85.001(d).

WHEREFORE, PREMISES CONSIDERED, Defendant Travis County Clerk, Dana DeBeauvoir asks that this Court enter an order granting the relief requested, as well as other and further relief to which she may show herself justly entitled.

///

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT  
TRAVIS COUNTY CLERK,  
DANA DEBEAUVOIR

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Defendant Travis County Clerk, Dana DeBeauvoir's Counter-Petition to Align Early Voting Period** was served in accordance with the Texas Rules of Civil Procedure by electronic service and/or electronic mail on all parties and attorneys of record in this proceeding on this 10<sup>th</sup> day of April, 2020, including:

Anne Marie Mackin <a href="mailto:anna.mackin@oag.texas.gov">anna.mackin@oag.texas.gov</a> Michael R. Abrams <a href="mailto:michael.abrams@oag.texas.gov">michael.abrams@oag.texas.gov</a> Assistant Attorneys General PO Box 12548, Capitol Station Austin, Texas 78711-2548 <i>Attorneys for Intervenor/Defendant, State of Texas</i>	Chad W. Dunn <a href="mailto:chad@brazilanddunn.com">chad@brazilanddunn.com</a> K. Scott Brazil <a href="mailto:scott@brazilanddunn.com">scott@brazilanddunn.com</a> Brazil & Dunn, LLP 4407 Bee Caves Road, Suite 111 Austin, Texas 78746 <i>Attorneys for Plaintiffs, Texas Democratic Party, et al.</i>
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/s/ Cynthia W. Veidt

SHERINE E. THOMAS

LESLIE W. DIPPEL

SHARON M. TALLEY

CYNTHIA W. VEIDT

ANDREW M. WILLIAMS

Assistant County Attorneys



## NOTICE OF EMERGENCY RULES ADOPTION

**BY:** Dr. Mark Escott, Interim, Medical Director and Health Authority.

### ADOPTION DATE:

The Health Authority has adopted the following Emergency Rules as authorized by Ordinance No. 20200709-003. This notice is issued under Chapter 1-2 (*Adoption of Rules*) of the City Code.

### EFFECTIVE DATE OF EMERGENCY RULES

The Emergency Rules adopted by this notice were **effective on August 14, 2020** and **expire on November 12, 2020** unless the rules are withdrawn or amended.

### SUMMARY OF RULES

The Emergency Rules govern individuals and sites within the City of Austin; and impose requirements reasonably necessary to protect public health related to the transmission of COVID-19. These rules supersede Health Authority Rules adopted on July 14, 2020.

### TEXT OF THE RULES

See Exhibit A attached to this Notice of Emergency Rules Adoption.

### NATURE OF EMERGENCY

The Health Authority and the City Manager find that an imminent peril to the public health, safety, or welfare requires adoption of the rules on an emergency basis. Specifically, emergency rules are required to reduce the possibility of exposure to COVID-19 and protect public health.

### AUTHORITY FOR ADOPTION OF PROPOSED RULES

The authority and procedure for adoption of a rule is provided in City Code Chapter 1-2 (*Adoption of Rules*). The authority to adopt rules to protect public health is established in Ordinance No. 20200709-003.

### CERTIFICATION BY CITY ATTORNEY

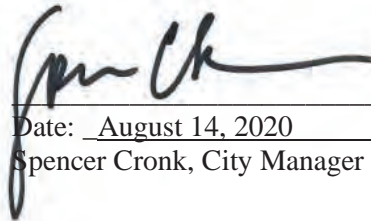
By signing this Notice of Emergency Rules, the City Attorney certifies the City Attorney has reviewed the Emergency Rules and finds that adoption of the Emergency Rules is a valid exercise of the Health Authority and City Manager's authority.

### REVIEWED AND APPROVED



Date: August 14, 2020

Dr. Mark Escott, Interim Medical Director  
and Health Authority



Date: August 14, 2020

Spencer Cronk, City Manager

\_\_\_\_\_  
Anne L. Morgan, City Attorney

Date: \_\_\_\_\_

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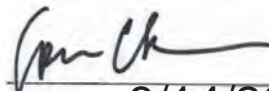
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By signing this Notice of Emergency Rules, the City Attorney certifies the City Attorney has reviewed the Emergency Rules and finds that adoption of the Emergency Rules is a valid exercise of the Health Authority and City Manager's authority.

### REVIEWED AND APPROVED

Date: \_\_\_\_\_

Dr. Mark Escott, Interim Medical Director  
and Health Authority

  
Date: 8/14/20  
Spencer Cronk, City Manager



Anne L. Morgan, City Attorney

Date: 8/14/2020

# HEALTH AUTHORITY RULES

August 14, 2020



## 1. Definitions.

- A. CLOSE CONTACT means sharing eating or drinking utensils with a COVID-19 positive individual; caring for a COVID-19 positive individual; or being:
  - 1. exposed during an event such as a cough or sneeze to the respiratory droplets of a COVID-19 positive individual; or
  - 2. within six feet of another individual for 15 or more minutes within 48 hours of experiencing symptoms consistent with COVID-19
- B. COHORT means a stable group of students and teachers that is smaller than a normal class size.
- C. COVID-19 means the pandemic that is the subject of the Local Disaster Declaration, dated March 6, 2020.
- D. COVID-19 POSITIVE means an individual who tested positive for COVID-19.
- E. EXTRACURRICULAR ACTIVITIES means an activity involving students that may have an indirect relation to some areas of the curriculum. Activities include, but are not limited to, public performances, contests, demonstrations, displays, and club activities; and include both University Interscholastic League (UIL) sponsored activities and activities that are not sponsored by UIL.
- F. FACE COVERING means a covering that fits snugly over an individual's nose and mouth, such as a commercially made or homemade fabric mask, scarf, bandana, handkerchief, or shield. Although the CDC does not recommend that face shields be used for normal everyday activities or as a substitute for cloth face coverings, individuals who cannot wear a cloth face covering may consider wearing a face shield.
- G. GENERAL HEALTH PRE-SCREENING means:
  - 1. asking questions intended to find out whether a worker is experiencing symptoms or has been exposed to someone with COVID-19;
  - 2. reiterating public health requirements; and
  - 3. checking face covering.
- H. HAND SANITIZER means a liquid or gel generally used to decrease infectious agents on the hands that consists of at least 60% alcohol.
- I. HEALTH AUTHORITY means City of Austin /Travis County Health Authority or his designee.
- J. HIGH TOUCH ITEM means an object, surface, tool, equipment, or piece of electronics that is utilized by individuals multiple times a day. This includes, but is not limited to, levers, light switches, phones, remote controls, counters, tabletops, doorknobs, bathroom fixtures, toilets, keyboards, tablets, hammers and wrenches.
- K. KNOWN EXPOSURE means close contact with an individual who is confirmed or suspected COVID-19 positive.

## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- L. **MAINTAINS** means to own, operate, manage, or oversee a site.
- M. **PERSON IN CONTROL** means a person who maintains a site.
- N. **SITE** means property. A site does not include:
  - 1. property maintained by a governmental entity that is not a school district;
  - 2. property where medical services are provided;
  - 3. dwelling unit where the individual resides.
- O. **STANDARD PRECAUTIONS** means a group of infection prevention practices that apply to all patients, regardless of suspected or confirmed diagnosis or presumed infection status; and is a combination and expansion of Universal Precautions 780 and Body Substance Isolation 1102.
- P. **SYMPTOMS CONSISTENT WITH COVID-19** means cough, fever, sore throat, runny nose or congestion, chills, muscle or body aches, loss of smell, loss of taste, shortness of breath, difficulty breathing, fatigue, vomiting, nausea, and/or diarrhea.
- Q. **TRANSMISSION-BASED PRECAUTIONS** means the second tier of basic infection control and are to be used in addition to Standard Precautions for patients who may be infected or colonized with certain infectious agents for which additional precautions are needed to prevent infection transmission.
- R. **VULNERABLE INDIVIDUAL** means an individual who:
  - 1. is 65 years old and older; or
  - 2. has certain health conditions such as heart disease, lung disease, diabetes, kidney disease, Human Immunodeficiency Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS), or a weakened immune system
- S. **WORKER** means an employee, independent contractor, subcontractor, or other similar agent present at the site

### **2. Rules Applicable to Individuals.**

#### **2.1. Face Coverings.**

- 2.1.1. Except as provided in 2.1.2, an individual must wear a face covering when outside of his or her residence.
- 2.1.2. Exceptions. A face covering is not required for:
  - 2.1.2.1. any person younger than 10 years of age (though it is still recommended for children two years of age and older);
  - 2.1.2.2. any person with a medical condition or disability that prevents wearing a face covering;
  - 2.1.2.3. any person while the person is eating or drinking, or is seated at a restaurant to eat or drink;
  - 2.1.2.4. any person while the person is (a) exercising outdoors or engaging in physical activity outdoors and (b) maintaining a safe distance from others not in the same household;
  - 2.1.2.5. any person while the person is driving alone or with passengers of the same household as the driver;
  - 2.1.2.6. any person obtaining a service that requires temporary removal of the face covering for security surveillance, screening, or the need for specific access to the face, such as while visiting a bank or while obtaining a



## **HEALTH AUTHORITY RULES**

**August 14, 2020**

personal care service involving the face, but only to the extent necessary for the temporary removal;

- 2.1.2.7. any person while the person is in a swimming pool, lake, or similar body of water;
- 2.1.2.8. any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election, but wearing a face covering is strongly encouraged;
- 2.1.2.9. any person who is actively providing or obtaining access to religious worship;
- 2.1.2.10. any person while the person is giving a speech for a broadcast or to an audience; or
- 2.1.2.11. any person while temporary removal of the face covering is necessary for communication by or with a person who is hearing impaired; or
- 2.1.2.12. any person who is alone, or in the presence of only members of the same household or residence, in a separate room or single space not accessible to the public, and not in an indoor common area.

2.2. No more than ten individuals may stand or gather together.

### **2.3. Physical Distancing**

- 2.3.1. Except as provided in 2.3.2, an individual must be at least six feet apart from another individual.
- 2.3.2. Exceptions. An individual is not required to stay six feet from another individual in the following circumstances:
  - 2.3.2.1. When passing another individual is incidental and momentary.
  - 2.3.2.2. When all individuals reside in the same household.
  - 2.3.2.3. When it is not feasible to maintain six feet distance between a service provider and patron.
  - 2.3.2.4. When the individual is dining with nine or fewer individuals.
- 2.3.3. A parent or guardian of a child who is under the age of 10 is responsible for maintaining physical distance between the child in their household and others' households.
- 2.3.4. A group of ten or fewer individuals must be at least six feet from another group of ten or fewer individuals except when the groups are seated at tables that are at least four feet apart and separated by a solid barrier.

### **2.4. Positive Test, Pending Test, Known Exposure, or Symptomatic.**

- 2.4.1. If someone in a household is COVID-19 positive or is awaiting the results of a COVID-19 test, the entire household shall isolate and avoid travel outside of the City of Austin except to seek medical attention until the household is cleared by Austin Public Health.
- 2.4.2. When seeking medical care or emergency medical care, an individual who is COVID-19 positive, is experiencing symptoms consistent with COVID-19, or experienced a known exposure must notify the healthcare provider in advance or, in the event of an emergency, the 9-1-1 call taker and first responders.
- 2.4.3. An individual who tested positive shall:

## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- 2.4.3.1. notify Austin Public Health if the residence does not allow for physical separation from other household contacts (separate room and bathroom);
- 2.4.3.2. notify Austin Public Health if a member of their household is over the age of 65 and/or if they have underlying medical conditions identified by the Centers for Disease Control (CDC) of increasing the risk of complications from COVID-19; and
- 2.4.3.3. remain in home quarantine for at least 10 days after symptoms first appeared, at least 24 hours with no fever without fever-reducing medication, and symptoms have improved.
- 2.4.4. An individual who experienced a known exposure shall:
  - 2.4.4.1. quarantine themselves at home for a period of 14 days since the last contact with an individual known or suspected to be COVID-19 positive, regardless of the presence of symptoms; and
  - 2.4.4.2. if the individual becomes symptomatic, follow the requirements in 2.4.3.

### **3. Rules Applicable to Sites.**

- 3.1. General. Rules 3.1-3.3 do not apply to a site that where child care programs operate.
- 3.2. A person in control of a site must:
  - 3.2.1. require each individual to wear a face covering except as provided in 2.1.2;
  - 3.2.2. clean and disinfect high touch items at least twice per day;
  - 3.2.3. limit the number of individuals who gather or stand together to ten or less;
  - 3.2.4. require at least six feet between groups of individuals except when the groups are seated at tables that are at least four feet apart and separated by a solid barrier;
  - 3.2.5. conduct a general health pre-screening of each worker every day before the worker begins his or her shift unless the site is a school;
  - 3.2.6. keep toilets clean, sanitary and operational at all times and ensure proper disposal of waste from these facilities;
  - 3.2.7. provide single use disposable paper towels and no-touch trash receptacles in restrooms and breakrooms;
  - 3.2.8. mandate workers wash their hands for at least twenty seconds at the following times:
    - 3.2.8.1. before workers begin work;
    - 3.2.8.2. after workers remove gloves;  
before and after the use of high touch items;
    - 3.2.8.3. before and after any meal or restroom breaks;
    - 3.2.8.4. after a worker's shift or work time ends; and
  - 3.2.9. for workers confirmed to have contracted COVID-19, follow all directions from Austin Public Health concerning that worker and other workers that may have come in contact with the infected worker.
- 3.3. Signs required. A person in control of a site shall post:
  - 3.3.1. at least one face covering signs at or near each entrance;
  - 3.3.2. at least one Austin Public Health "Help Prevent Disease" signs at each entrance and on each restroom door (available for download and print at:

## HEALTH AUTHORITY RULES

August 14, 2020

<http://www.austintexas.gov/sites/default/files/files/Health/General%20Hygiene%20Flyer%20Final2-1-eng-051120.pdf> ); and

- 3.3.3. where information for workers is customarily posted, at least one sign in English and at least one sign in Spanish that explains the requirement to remain at least six feet apart and the requirement to wear a face covering.

### **4. Rules Applicable to Hospitals, Pharmacies, Clinics, and Similar Entities.**

- 4.1. A hospital, pharmacy, clinic, or any other entity or person who performs or obtains testing for COVID-19 shall provide the Health Authority test results at least weekly on Thursdays and, beginning August 31, 2020, twice weekly on Mondays and Thursdays. The test results must include PCR, antigen, antibody testing, and other information when specifically requested by the Health Authority; and must be provided in electronic form and in the manner directed by Austin Public Health. In this provision, test results means the tests performed and those reported positive, negative, or inconclusive.
- 4.2. Any data that is required to be provided to the State of Texas under state law shall be simultaneously provided to the Health Authority if the individual is tested within the City of Austin or Travis County.

### **5. Rules Applicable to Specific Types of Sites.**

- 5.1. Construction Sites. A person in control of a construction site shall comply with Rules Applicable to Sites and:
  - 5.1.1. institute staggered shifts for sites with more than 10 active workers and post at these sites, in languages understood by all persons working there, a notice showing the sizes and types of shift crews working there, and directions on how the person in control is limiting crew sizes and rotating shifts;
  - 5.1.2. ensure handwashing station and restroom(s) are spaced six feet apart or more from each other;
  - 5.1.3. prohibit the use of community water coolers;
  - 5.1.4. provide individual water bottles or instruct workers to bring their own;
  - 5.1.5. designate a COVID-19 safety monitor who is always on-site; and
  - 5.1.6. ensure that each worker who enters a jobsite has signed in and keep a list of and contact information for each worker that enters the jobsite every day for the purpose of identifying and notifying workers if they have shared a jobsite with someone who has been confirmed to have COVID-19.
- 5.2. Child Care Facilities.
  - 5.2.1. Notify Austin Public Health's Nurse Line at 512-972-5560 to report any laboratory confirmed cases of COVID-19 among children or staff.
  - 5.2.2. Follow the steps provide by Austin Public Health regarding suspected or confirmed cases of COVID-19.
  - 5.2.3. Comply with "City of Austin Guidance for Open Child Care Programs."
- 5.3. Schools. A person in control of a school that offers instruction to students in one or more grades, pre-kindergarten through grade 12, shall comply with Rules Applicable to Sites and the requirements described in this rule.
  - 5.3.1. COVID-19 Point of Contact.

## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- 5.3.1.1. Each school district must designate a district-wide COVID-19 point of contact. A person designated as a district-wide COVID-19 point of contact must notify Austin Public Health at 512-972-5560 when a student or worker is COVID-19 positive
- 5.3.1.2. A person in control of a school that is within a school district must designate a COVID-19 point of contact who will communicate with workers, students, and families about COVID-19 concerns.
- 5.3.1.3. A person in control of a school that is not within a school district must designate a COVID-19 point of contact.
  - 5.3.1.3.1. A person designated as a COVID-19 point of contact in Rule 5.3.1.3 must notify Austin Public Health at 512-972-5560 when a student or worker is COVID-19 positive.
  - 5.3.1.3.2. A person designated as a COVID-19 point of contact in Rule 5.3.1.3 must communicate with workers, students, and families about COVID-19 concerns.
- 5.3.2. A person in control must:
  - 5.3.2.1. provide soap, single use disposal paper towels, and tissues in each classroom, restroom, and break room where a sink or handwashing station is present;
  - 5.3.2.2. provide hand sanitizer for use by older children and workers in each classroom, at building entrances and exits, in the cafeteria, and in the gym;
  - 5.3.2.3. incorporate handwashing breaks into classroom activity;
  - 5.3.2.4. train workers and students about hand hygiene, respiratory etiquette, and proper use of face coverings;
  - 5.3.2.5. limit the use of shared supplies and equipment to one group of children at a time and clean and disinfect between uses
  - 5.3.2.6. require at least six feet between workers, students, and visitors when stationary and, to the greatest extent possible, six feet between seating in classrooms, reception areas, and cafeterias;
  - 5.3.2.7. require workers and students to screen for COVID-19 symptoms and exposure at home each day prior to arriving at school;
  - 5.3.2.8. limit the number of visitors and activities involving external groups or organizations; and
  - 5.3.2.9. provide cloth face coverings or disposable face coverings for workers, visitors, and students who do not have them or if a face covering becomes soiled.
- 5.3.3. When feasible, a person in control must divide students and teachers into cohorts that are static and must limit mixing between cohorts.
- 5.3.4. A person in control must:
  - 5.3.4.1. create a process for students, families, and workers to self-identify as being at increased risk of severe illness from COVID-19 or as living in a household with someone at high risk; and



## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- 5.3.4.2. review all current plans for accommodating students with special healthcare needs and update their care plans as needed to decrease the risk for exposure to COVID-19.
- 5.3.5. A person in control must ensure that:
  - 5.3.5.1. ventilation systems operate properly and increase circulation of outdoor air as much as possible; and
  - 5.3.5.2. building water systems and related devices are safe after a prolonged shut down by following CDC Guidance for Building Water Systems.
- 5.3.6. Food service.
  - 5.3.6.1. A person in control of a school that serves food must serve food as individually plated meals.
  - 5.3.6.2. A person in control must provide disposable food service items unless non-disposable food service items are handled with gloves and washed with dish soap and hot water or in a dishwasher.
  - 5.3.6.3. An individual who touches used food service items must wash their hands even if the individual wears gloves.
- 5.3.7. Outdoor Activities.
  - 5.3.7.1. A person in control must require students practice physical distancing during recess or in physical education class.
  - 5.3.7.2. A person in control must limit the use of shared equipment.
- 5.3.8. Band, Choir, or Music Class
  - 5.3.8.1. When students are not singing or playing an instrument that requires the use of their mouth, a person in control must require students to wear face coverings except as provided in 2.1.2.
  - 5.3.8.2. When students are singing or playing an instrument, a person in control must use visual clues to require students to maintain at least six feet of distance.
- 5.3.9. Sports and Extracurricular Activities.
  - 5.3.9.1. A person in control must provide each parent or guardian of a student who participates in sports or extracurricular activities with a written notice that:
    - 5.3.9.1.1. explains these activities increase the risk of COVID-19 transmission to the student and the household; and
    - 5.3.9.1.2. recommends each student practice physical distancing and wear face coverings while at home.
  - 5.3.9.2. The notice described in Rule 5.3.9.1 applies to sports and extracurricular activities where physical distancing or masking is not possible or practical.
  - 5.3.9.3. Strength and Conditioning
    - 5.3.9.3.1. A person in control may allow strength and conditioning activities to resume beginning on August 17, 2020 if the notice described in Rule 5.3.9.1 is provided and the person in control of a school complies with the guidance promulgated by the University Interscholastic League (UIL)

## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- 5.3.9.3.2. A person in control must clean surfaces and equipment (i.e. benches, barbells, dumbbells, kettlebells, training ropes, medicine balls, pull-up bars, weight bars, etc.) after individual use.
    - 5.3.9.3.3. A person in control must limit the use of shared equipment to one individual or a group of individuals.
  - 5.3.10. Procedures when an individual exhibits symptoms consistent with COVID-19 while at school.
    - 5.3.10.1. A person in control must isolate an individual who develops symptoms consistent with COVID-19 and follow the school's illness management policy.
    - 5.3.10.2. A person in control must provide an individual who is required to leave the school with information on quarantine, isolation, and return-to-campus criteria.
    - 5.3.10.3. A person in control must ensure that an isolation area is cleaned in a manner that complies with CDC's "Considerations for Cleaning and Disinfecting Your Building or Facility If Someone Is Sick".
    - 5.3.10.4. A person in control must follow Standard Precautions and Transmission-Based Precautions when caring for an individual who becomes ill at school.
    - 5.3.10.5. A person in control must provide equipment for and training on the use of Standard and Transmission-based Precautions and Personal Protective Equipment (PPE).
  - 5.3.11. COVID-19 Positive.
    - 5.3.11.1. A person in control must establish procedures that will allow workers to determine when the individual was last on campus.
    - 5.3.11.2. A person in control must follow any protocols, including privacy protocols, for identifying and notifying individuals who were in close contact with the individual who is COVID-19 positive.
    - 5.3.11.3. A person in control must ensure that any area used by the COVID-19 positive individual is cleaned in a manner that complies with CDC's "Considerations for Cleaning and Disinfecting Your Building or Facility If Someone Is Sick."
- 5.4. After School Programs. A person who operates an after-school program at a school shall comply with Rules Applicable to Sites and Rule 5.3.
- 5.5. Transportation provided for schools. A person in control of a bus or other similar vehicle used to transport students must:
  - 5.5.1. create distance between and among the driver and passengers when possible;
  - 5.5.2. limit each bus seat to one passenger unless the students are members of the same household;
  - 5.5.3. institute measures that physically separate or create distance that exceeds six feet between a bus operator and passengers;
  - 5.5.4. clean, sanitize, and disinfect equipment including items such as car seats and seat belts, wheelchairs, walkers, and adaptive equipment being transported to schools;

## **HEALTH AUTHORITY RULES**

**August 14, 2020**

- 5.5.5. clean and disinfect frequently touched surfaces in the vehicle (e.g., surfaces in the driver's cockpit, hard seats, arm rests, door handles, seat belt buckles, light and air controls, doors and windows, and grab handles) prior to morning routes and prior to afternoon routes; and
- 5.5.6. provide hand sanitizer.



GOVERNOR GREG ABBOTT

October 7, 2020

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
3pm O'CLOCK

OCT 07 2020

*[Signature]*  
Secretary of State

The Honorable Ruth R. Hughs  
Secretary of State  
State Capitol Room 1E.8  
Austin, Texas 78701

Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

Executive Order No. GA-32 relating to the continued response to the COVID-19  
disaster as Texas reopens.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,

*[Signature]*  
Gregory S. Davidson  
Executive Clerk to the Governor  
GSD/gsd

Attachment

POST OFFICE BOX 12428 AUSTIN, TEXAS 78711 512-463-2000 (VOICE) DIAL 7-1-1 FOR RELAY SERVICES

**PLAINTIFF'S  
EXHIBIT**

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# Executive Order

BY THE  
GOVERNOR OF THE STATE OF TEXAS

Executive Department  
Austin, Texas  
October 7, 2020

## EXECUTIVE ORDER GA 32

*Relating to the continued response to the COVID-19 disaster as Texas reopens.*

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have renewed the disaster declaration for all Texas counties; and

WHEREAS, I have issued executive orders and suspensions of Texas laws in response to COVID-19, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, I issued Executive Order GA-08 on March 19, 2020, mandating certain social-distancing restrictions for Texans in accordance with guidelines promulgated by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC); and

WHEREAS, I issued Executive Order GA-14 on March 31, 2020, expanding the social-distancing restrictions for Texans based on guidance from health experts and the President; and

WHEREAS, I subsequently issued Executive Orders GA-16, GA-18, GA-21, GA-23, and GA-26 from April through early June 2020, aiming to achieve the least restrictive means of combatting the threat to public health by continuing certain social-distancing restrictions, while implementing a safe, strategic plan to reopen Texas; and

WHEREAS, as Texas reopens in the midst of COVID-19, increased spread is to be expected, and the key to controlling the spread and keeping Texas residents safe is for all Texans to consistently follow good hygiene and social-distancing practices, especially those set forth in the minimum standard health protocols from the Texas Department of State Health Services (DSHS); and

WHEREAS, in June 2020, Texas experienced substantial increases in COVID-19 cases and hospitalizations, necessitating targeted and temporary adjustments to the reopening plan to achieve the least restrictive means for reducing the growing spread of COVID-19 and the resulting imminent threat to public health, and to avoid a need for more extreme measures; and

WHEREAS, I therefore issued Executive Orders GA-28 and GA-29 in late June and early

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July 2020, respectively, and amended Executive Order GA-28 by proclamation on July 2, 2020; and

WHEREAS, due to improved medical treatments for COVID-19 patients, substantial increases in testing, abundant supplies of personal protective equipment, and Texans' adherence to safe practices like social distancing, hand sanitizing, and use of face coverings, the spread of COVID-19 and the number of new COVID-19 cases and hospitalizations have steadily and significantly declined since late July; and

WHEREAS, I therefore issued Executive Orders GA-30 and GA-31 on September 17, 2020, allowing additional reopening and non-essential medical surgeries and procedures in Texas, except in some areas with high hospitalizations as defined in those orders; and

WHEREAS, as Texas continues to reopen, everyone must act safely, and to that end, this executive order and prior executive orders provide that all persons should follow the health protocols from DSHS, which whenever achieved will mean compliance with the minimum standards for safely reopening, but which should not be used to fault those who act in good faith but can only substantially comply with the standards in light of scarce resources and other extenuating COVID-19 circumstances; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility "for meeting ... the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders ... hav[ing] the force and effect of law;" and

WHEREAS, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable under Section 418.173 by a fine not to exceed \$1,000, and may be subject to regulatory enforcement;

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, and in accordance with guidance from the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt, other medical advisors, the White House, and the CDC, do hereby order the following on a statewide basis effective at 12:01 a.m. on October 14, 2020:

Every business establishment in Texas shall operate at no more than 75 percent of the total listed occupancy of the establishment; provided, however, that:

1. There is no occupancy limit for the following:
  - a. any services listed by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) in its Guidance on the Essential Critical Infrastructure Workforce, Version 4.0 or any subsequent version;
  - b. religious services, including those conducted in churches, congregations, and houses of worship;
  - c. local government operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, as determined by the local government;

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- d. child-care services;
  - e. youth camps, including but not limited to those defined as such under Chapter 141 of the Texas Health and Safety Code, and including all summer camps and other daytime and overnight camps for youths;
  - f. recreational sports programs for youths and adults;
  - g. any public or private schools, and any public or private institutions of higher education, not already covered above;
  - h. drive-in concerts, movies, or similar events, under guidelines that facilitate appropriate social distancing, that generally require spectators to remain in their vehicles, and that minimize in-person contact between people who are not in the same household or vehicle; and
  - i. the following establishments that operate with at least six feet of social distancing between work stations: cosmetology salons, hair salons, barber shops, nail salons/shops, and other establishments where licensed cosmetologists or barbers practice their trade; massage establishments and other facilities where licensed massage therapists or other persons licensed or otherwise authorized to practice under Chapter 455 of the Texas Occupations Code practice their trade; and other personal-care and beauty services such as tanning salons, tattoo studios, piercing studios, hair removal services, and hair loss treatment and growth services.
2. In areas with high hospitalizations as defined below, any business establishment that otherwise would have a 75 percent occupancy or operating limit may operate at up to only 50 percent. This paragraph does not apply, however, to business establishments located in a county that has filed with DSHS, and is in compliance with, the requisite attestation form promulgated by DSHS regarding minimal cases of COVID-19.
- “Areas with high hospitalizations” means any Trauma Service Area that has had seven consecutive days in which the number of COVID-19 hospitalized patients as a percentage of total hospital capacity exceeds 15 percent, until such time as the Trauma Service Area has seven consecutive days in which the number of COVID-19 hospitalized patients as a percentage of total hospital capacity is 15 percent or less. A current list of areas with high hospitalizations will be maintained at [www.dshs.texas.gov/ga3031](http://www.dshs.texas.gov/ga3031).
3. Except as provided below by paragraph No. 5, there is no occupancy limit for outdoor areas, events, and establishments, with the exception of the following outdoor areas, events, or establishments that may operate at no more than 75 or 50 percent, as applicable, of the normal operating limits as determined by the owner:
- a. amusement parks;
  - b. water parks;
  - c. swimming pools;
  - d. museums and libraries; and
  - e. zoos, aquariums, natural caverns, and similar facilities.
4. All indoor and outdoor professional, collegiate, and similar sporting events, including rodeos and equestrian events, shall remain limited to 50 percent of the normal operating limits as determined by the owner.
5. For any outdoor gathering in excess of 10 people, including rafting, tubing, and related services, other than those set forth above in paragraph Nos. 1, 3, or 4, the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.

6. Restaurants that have less than 51 percent of their gross receipts from the sale of alcoholic beverages, and whose customers eat or drink only while seated, may offer dine-in services.
7. Bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission (TABC), and are not restaurants as defined above in paragraph No. 6, may offer on-premises services only as described by this paragraph. A bar or similar establishment may offer on-premises services at up to 50 percent of the total listed occupancy of the establishment *if*:
  - a. the bar or similar establishment is not in an area with high hospitalizations as defined above, and the county judge of the county in which the bar or similar establishment is located files the requisite form with TABC; or
  - b. the bar or similar establishment is in an area with high hospitalizations as defined above, but is located in a county that has filed with DSHS, and is in compliance with, the requisite attestation form promulgated by DSHS regarding minimal cases of COVID-19, and the county judge of the county in which the bar or similar establishment is located also files the requisite form with TABC.

Patrons at bars or similar establishments operating under this paragraph may eat or drink only while seated, except that in an establishment that holds a permit from TABC as a brewer, distiller/rectifier, or winery, customers may sample beverages while standing so long as they are in a group of six people or fewer and there is at least six feet of social distancing or engineering controls, such as partitions, between groups.

Where applicable, this 50 percent occupancy limit applies only indoors; the limit does not apply to outdoor areas, events, or establishments, although social distancing and other protocols must be followed.

People shall not visit bars or similar establishments that are located in counties not included in parts (a) or (b) above. A current list of all counties reopening under this paragraph will be maintained on TABC's website.

The use by bars or similar establishments of drive-thru, pickup, or delivery options for food and drinks remains allowed to the extent authorized by TABC.

8. For purposes of this executive order, facilities with retractable roofs are considered indoor facilities, whether the roof is opened or closed.
9. Staff members are not included in determining operating levels, except for manufacturing services and office workers.
10. Except as provided in this executive order or in the minimum standard health protocols recommended by DSHS, found at [www.dshs.texas.gov/coronavirus](http://www.dshs.texas.gov/coronavirus), people shall not be in groups larger than 10 and shall maintain six feet of social distancing from those not in their group.
11. People over the age of 65 are strongly encouraged to stay at home as much as possible; to maintain appropriate distance from any member of the household who has been out of the residence in the previous 14 days; and, if leaving the home, to implement social distancing and to practice good hygiene, environmental cleanliness, and sanitation.
12. In providing or obtaining services, every person (including individuals, businesses, and other legal entities) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS.
13. Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining

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services.

14. People may visit nursing homes, state supported living centers, assisted living facilities, or long-term care facilities as determined through guidance from the Texas Health and Human Services Commission (HHSC). Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow infection control policies and practices set forth by HHSC, including minimizing the movement of staff between facilities whenever possible.
15. Public schools may operate as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency (TEA). Private schools and institutions of higher education are encouraged to establish similar standards.

Notwithstanding anything herein to the contrary, the governor may by proclamation add to the list of establishments or venues that people shall not visit.

This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts services allowed by this executive order, allows gatherings prohibited by this executive order, or expands the list or scope of services as set forth in this executive order. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.

All existing state executive orders relating to COVID-19 are amended to eliminate confinement in jail as an available penalty for violating the executive orders. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail as an available penalty for violating a COVID-19-related order, that order allowing confinement in jail is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster.

This executive order supersedes Executive Order GA-30, but does not supersede Executive Orders GA-10, GA-13, GA-17, GA-24, GA-25, GA-29, or GA-31. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.



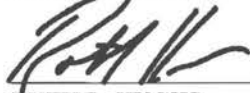
Given under my hand this the 7th  
day of October, 2020.

  
GREG ABBOTT  
Governor

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
3:00 PM O'CLOCK

OCT 07 2020

ATTESTED BY:



RUTH R. HUGHS  
Secretary of State

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
3pm O'CLOCK

OCT 07 2020

# Coronavirus Disease 2019 (COVID-19)

MENU >



## What to Do If You Are Sick What to Do If You Are Sick

Updated Sept. 11, 2020

[Print](#)

If you have a fever, cough or [other symptoms](#), you might have COVID-19. Most people have mild illness and are able to recover at home. If you think you may have been exposed to COVID-19, contact your healthcare provider.

- Keep track of your symptoms.
- If you have [an emergency warning sign](#) (including trouble breathing), get emergency medical care immediately.



### Self-checker

A tool to help you make decisions and seek appropriate medical care

[Get Started](#)

[About the Tool](#)

## Steps to help prevent the spread of COVID-19 if you are sick

If you are sick with [COVID-19](#) or think you might have [COVID-19](#), follow the steps below to care for yourself and to help protect other people in your home and community.



### Stay home except to get medical care

- **Stay home.** Most people with COVID-19 have mild illness and can recover at home without medical care. Do not leave your home, except to get medical care. Do not visit public areas.
- **Take care of yourself.** Get rest and stay hydrated. Take over-the-counter medicines, such as acetaminophen, to help you feel better.
- **Stay in touch with your doctor.** Call before you get medical care. Be sure to get care if you have trouble breathing, or have any other [emergency warning signs](#), or if you think it is an [emergency](#).
- **Avoid public transportation, ride-sharing, or taxis.**



### Separate yourself from other people

As much as possible, stay in a specific room and away from other people and pets in your home. If possible, you should use a separate bathroom. If you need to be around other people or animals in or outside of the home, wear a mask.

**PLAINTIFF'S  
EXHIBIT**

**18**

Tell your [close contacts](#) that they may have been exposed to COVID-19. An infected person can spread COVID-19 starting 48 hours (or 2 days) before the person has any symptoms or tests positive. By letting your close contacts know they may have been exposed to COVID-19, you are helping to protect everyone.

- Additional guidance is available for those living in [close quarters](#) and [shared housing](#).
- See [COVID-19 and Animals](#) if you have questions about pets.
- If you are diagnosed with COVID-19, someone from the health department may call you. [Answer the call](#) to slow the spread.



## Monitor your symptoms

- [Symptoms](#) of COVID-19 include fever, cough, or other symptoms.
- Follow care instructions from your healthcare provider and local health department. Your local health authorities may give instructions on checking your symptoms and reporting information.

### When to seek emergency medical attention

Look for **emergency warning signs\*** for COVID-19. If someone is showing any of these signs, **seek emergency medical care immediately**:

- Trouble breathing
- Persistent pain or pressure in the chest
- New confusion
- Inability to wake or stay awake
- Bluish lips or face

\*This list is not all possible symptoms. Please call your medical provider for any other symptoms that are severe or concerning to you.

**Call 911 or call ahead to your local emergency facility:** Notify the operator that you are seeking care for someone who has or may have COVID-19.



## Call ahead before visiting your doctor

- **Call ahead.** Many medical visits for routine care are being postponed or done by phone or telemedicine.
- **If you have a medical appointment that cannot be postponed, call your doctor's office,** and tell them you have or may have COVID-19. This will help the office protect themselves and other patients.



## If you are sick, wear a mask over your nose and mouth

- You should wear a [mask over your nose and mouth](#) if you must be around other people or animals, including pets (even at home).
- You don't need to wear the mask if you are alone. If you can't put on a mask (because of trouble breathing, for example), cover your coughs and sneezes in some other way. Try to stay at least 6 feet away from other people. This will help protect the people around you.
- Masks should not be placed on young children under age 2 years, anyone who has trouble breathing, or anyone who is not able to remove the mask without help.

**Note:** During the COVID-19 pandemic, medical grade facemasks are reserved for healthcare workers and some first responders.



## Cover your coughs and sneezes

- **Cover your mouth and nose** with a tissue when you cough or sneeze.
- **Throw away used tissues** in a lined trash can.
- **Immediately wash your hands** with soap and water for at least 20 seconds. If soap and water are not available, clean your hands with an alcohol-based hand sanitizer that contains at least 60% alcohol.



## Clean your hands often

- **Wash your hands** often with soap and water for at least 20 seconds. This is especially important after blowing your nose, coughing, or sneezing; going to the bathroom; and before eating or preparing food.
- **Use hand sanitizer** if soap and water are not available. Use an alcohol-based hand sanitizer with at least 60% alcohol, covering all surfaces of your hands and rubbing them together until they feel dry.
- **Soap and water** are the best option, especially if hands are visibly dirty.
- **Avoid touching** your eyes, nose, and mouth with unwashed hands.
- [Handwashing Tips](#)



## Avoid sharing personal household items

- **Do not share** dishes, drinking glasses, cups, eating utensils, towels, or bedding with other people in your home.
- **Wash these items thoroughly after using them** with soap and water or put in the dishwasher.



## Clean all “high-touch” surfaces everyday

- **Clean and disinfect** high-touch surfaces in your “sick room” and bathroom; wear disposable gloves. Let someone else clean and disinfect surfaces in common areas, but you should clean your bedroom and bathroom, if possible.
- **If a caregiver or other person needs to clean and disinfect** a sick person’s bedroom or bathroom, they should do so on an as-needed basis. The caregiver/other person should wear a mask and disposable gloves prior to cleaning. They should wait as long as possible after the person who is sick has used the bathroom before coming in to clean and use the bathroom.

High-touch surfaces include phones, remote controls, counters, tabletops, doorknobs, bathroom fixtures, toilets, keyboards, tablets, and bedside tables.

- **Clean and disinfect areas that may have blood, stool, or body fluids on them.**
- **Use household cleaners and disinfectants.** Clean the area or item with soap and water or another detergent if it is dirty. Then, use a household disinfectant.
  - Be sure to follow the instructions on the label to ensure safe and effective use of the product. Many products recommend keeping the surface wet for several minutes to ensure germs are killed. Many also recommend precautions such as wearing gloves and making sure you have good ventilation during use of the product.

- Most EPA-registered household disinfectants should be effective. A full list of disinfectants can be found [here](#) .
- [Complete Disinfection Guidance](#)



## When you can be around others after being sick with COVID-19

Deciding when you can be around others is different for different situations. Find out when you can [safely end home isolation](#).



## Is it COVID-19 or Flu?

Some of the symptoms of flu and COVID-19 are similar, making it hard to tell the difference between them based on symptoms alone. Diagnostic testing can help determine if you are sick with the flu or COVID-19.

[The Difference and Similarities between Flu and COVID-19](#)

**For any additional questions about your care,** contact your healthcare provider or state or local health department.

## Print Resources



## Caring for yourself at home: 10 things to manage your health

What you can do if you have possible or confirmed COVID-19:

- [English](#) [1 page]
- [Spanish](#)
- [Chinese](#)
- [Vietnamese](#)
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19****CORONAVIRUS IN TEXAS**

# Across Texas and the nation, the novel coronavirus is deadlier for people of color

New data on Texas coronavirus fatalities reveals stark racial disparities.

BY **EMMA PLATOFF** AND **CARLA ASTUDILLO** JULY 30, 2020 UPDATED: 7 PM

[COPY LINK](#)

Juan Lopez wheels a stretcher out of the back of his vehicle in McAllen. Across Texas and the nation, the novel coronavirus is deadlier for communities of color and low-income communities. 📷 Miguel Gutierrez Jr./The Texas Tribune

*Correction: On July 30, the state said an “automation error” caused approximately 225 deaths to be incorrectly added to the overall death count; a subsequent quality check by Department of State Health Services epidemiologists revealed COVID-19 was not the direct cause of death in these cases. The numbers and charts in this story have been updated to account for this error and are current as of July 30.*

Texas’ southernmost county, Cameron, is home to just 1.5% of the state’s population, but it accounts for nearly 5% of its known COVID-19 fatalities.

Cameron County — where 89% of residents are Hispanic and nearly a third live below the poverty line — stands out as just one stark example of widespread disparities in COVID-19 outcomes. Across Texas and the nation, the novel coronavirus is deadlier for communities of color and low-income communities.

These disparities, and a wealth of other demographic information, became more apparent this week when [new tallying methods](#) at the state health agency revealed a more complete picture of who has died in Texas and where. Trends showing that Black and Hispanic individuals had been disproportionately hit by the virus were clear nationally and apparent in local snapshots, but until earlier this week, the Texas Department of State Health Services’ limited demographic data had [clouded](#) the picture of those disparities statewide.

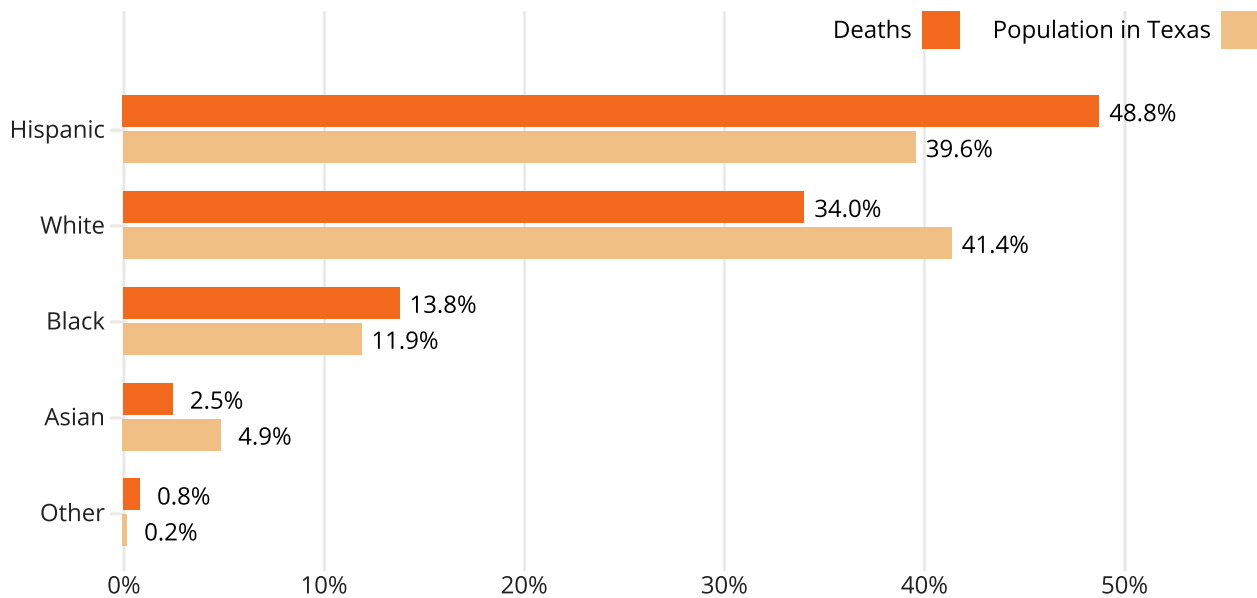
Hispanic Texans make up about 40% of the state’s population, but they account for 49% of its known COVID-19 fatalities. Black Texans also appear slightly overrepresented in the fatality toll, representing 14% of fatalities but just 12% of the state population. Texas reported a total of 6,274 fatalities Thursday evening.

By contrast, white and Asian Texans died at lower rates relative to their share of the state’s population.



## Percentage of coronavirus deaths by race and ethnicity

Hispanic Texans make up the largest percentage of coronavirus deaths at nearly 49% while making up only about 40% of the Texas population. About 66% of Texans who have died of coronavirus were people of color.



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Note: The “Other” race category includes those who were reported as multi-racial or some other race. Four deaths were either reported as unknown or the race and ethnicity category were left blank.

Source: Texas Department of State Health Services, U.S. Census Bureau 2018 population estimates

Credit: Carla Astudillo

Sometimes called the great equalizer, the novel coronavirus has been anything but — a deadly reality in a state like Texas, where the Hispanic population is expected to become the largest group in the state by mid-2021.

The disparities should not have been a surprise, said Jamboor Vishwanatha, director of the Texas Center for Health Disparities at the University of North Texas Health Science Center.

“What COVID did is essentially shined a bright light on existing disparities,” Vishwanatha said, citing disparities in rates of preexisting conditions like diabetes and cardiovascular issues, as well as social factors like income inequality and access to health care. “You would expect something like this to happen.”

Research has found that higher-paid employees are more likely to have the option to work from home, and that Black and Hispanic employees are less likely to be able to work remotely. In Texas and across the country, front-line

employees like janitors, [grocery clerks](#) and transit workers are [more likely](#) to be women and people of color, an Associated Press analysis of U.S. Census Bureau data revealed.

That's forced low-income workers and people of color to risk their health at work, exposing them to the virus while others earn a paycheck from home.

"Many of these folks, particularly early on, were exposed to the disease," Dr. Georges Benjamin, executive director of the American Public Health Association, said Wednesday at an event put on by The Academy of Medicine, Engineering and Science of Texas.

Benjamin said a higher prevalence of chronic illnesses like hypertension and heart disease is contributing to disparities.

Geography has also played a role. Many of Texas' deadliest hot spots have emerged in communities of color: among immigrant workforces at the [meatpacking plants](#) in the Panhandle; in Houston, one of the country's most diverse cities; and in the Rio Grande Valley, where the population is majority Hispanic.

In general, most deaths have been recorded where most Texans live — in big cities like Houston, Dallas, San Antonio, El Paso and Austin. But some counties, like Cameron and Hidalgo in the Rio Grande Valley, are mourning an outsized number of people relative to their population. Both counties are about 90% Hispanic.

Even in bigger urban areas, some whiter, wealthier counties seem to be faring better than poorer counties with more diverse populations. Travis County has some 400,000 more residents than El Paso County but fewer deaths, according to state data. According to census data, Travis County is about half white and a third Hispanic, with a median household income around \$76,000 annually; El Paso County is 83% Hispanic, with a median household income around \$44,000 annually.

# Share of coronavirus fatalities in 10 counties with most deaths

Coronavirus deaths have been mostly reported in larger counties. However, some counties like Hidalgo and Cameron with a majority Hispanic population are overrepresented in the percentage of deaths.

 County where Hispanics make up largest population group

County	Total deaths	Share of total deaths	Share of Texas population
Harris		19.2%	16.4%
Dallas		9.7%	9.2%
Bexar		8.7%	6.9%
Tarrant		5.7%	7.3%
Hidalgo		5.0%	3.0%
Cameron		4.8%	1.5%
El Paso		3.7%	2.9%
Travis		3.5%	4.4%
Fort Bend		2.2%	2.7%
Galveston		1.5%	1.2%

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Source: Texas Department of State Health Services, U.S. Census Bureau 2018 population estimates

Credit: Carla Astudillo

And the virus’ true death toll is almost certainly higher than reported; for experts, the question is by how much.

The state may be showing a particular undercount in Hidalgo, a majority-Hispanic county in the Rio Grande Valley that is being ravaged by COVID-19. County health officials, using local medical records, report 576 deaths; the state, now relying on death certificates, revised its tally for the county down from over 450 to 312. Local officials said the difference is caused by delays in the issuance of death certificates.

Meanwhile, Vishwanatha said, access to testing has been more limited in communities of color.

Pointing to local data from North Texas, Vishwanatha said there is a disparity between communities of color and white groups not only in chance of getting

infected but also in chance of dying from the disease. The gulf is even wider for mortality rate than it is for infection rate.

“We are currently facing a critical situation where some of our communities are really suffering. We need to do everything to overcome these disparities. But hopefully this COVID situation has brought out something that we should have been tackling all along — how to overcome these chronic health disparities that our communities suffer,” Vishwanatha said.

*Disclosure: The UNT Health Science Center has been a financial supporter of The Texas Tribune, a nonprofit, nonpartisan news organization that is funded in part by donations from members, foundations and corporate sponsors. Financial supporters play no role in the Tribune's journalism. Find a complete list of them [here](#).*

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